STATE PERSONNEL BOARD CALENDAR

MAY 4-5, 2004

SACRAMENTO, CALIFORNIA

State of California

Memorandum

DATE: April 23, 2004

TO: ALL INTERESTED PARTIES

FROM: **STATE PERSONNEL BOARD --** Appeals Division

SUBJECT: Notice and Agenda for the May 4-5, 2004, meeting of the State Personnel Board.

PLEASE TAKE NOTICE that on May 4-5, 2004, at the offices of the State Personnel Board, located at 801 Capitol Mall, Room 150, Sacramento, California, the State Personnel Board will hold its regularly scheduled meeting.

The attached Agenda provides a brief description of each item to be considered and lists the date and approximate time for discussion of the item.

Also noted is whether the item will be considered in closed or public session. Closed sessions are closed to members of the public. All discussions held in public sessions are open to those interested in attending. Interested members of the public who wish to address the Board on a public session item may request the opportunity to do so.

Should you wish to obtain a copy of any of the items considered in the public sessions for the May 4-5, 2004, meeting, please contact staff in the Secretariat's Office, State Personnel Board, 801 Capitol Mall, MS 22, Sacramento, CA 95814 or by calling (916) 653-0429 or TDD (916) 654-2360, or the Internet at: **http://www.spb.ca.gov/calendar.htm**

Should you have any questions regarding this Notice and Agenda, please contact staff in the Secretariat's Office at the address or telephone numbers above.

TAMARA LACEY
Secretariat's Office

Attachment

CALIFORNIA STATE PERSONNEL BOARD MEETING*
801 Capitol Mall
Sacramento, California

Public Session Location - Room 150

Closed Session Location - Room 141

TWO-DAY BOARD MEETING - MAY 4-5, 2004

FULL BOARD MEETING AGENDA**

MAY 4, 2004

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

9:00 - 9:30 1. ROLL CALL

2. REPORT OF THE EXECUTIVE OFFICER

Report of Laura Aguilera
Interim Executive Officer
State Personnel Board

3. REPORT OF THE CHIEF COUNSEL

4. NEW BUSINESS
(Items may be raised by Board Members for scheduling and discussion at future meetings.)

* Sign Language Interpreter will be provided for Board Meeting upon request – contact Secretariat at (916) 653-0429, or CALNET 453-0429, TDD (916) 654-2360.

** The Agenda for the Board can be obtained at the following Internet address: **http://www.spb.ca.gov/calendar.htm**

5. REPORT ON LEGISLATION

6. PERS REPORT

9:30 - 10:00 7. ORAL ARGUMENT
Oral Agrument in the matter of **CHRISTOPHER MIRAMONTES, CASE NO. 03-2299.** Appeal from five-percent reduction in salary for six months. Department of Corrections.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

10:00 - 10:15 8. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

10:15 - 10:45 9. HEARING – **PSC 04-01 and 04-02**
Appeal of the California State Employees Association (CSEA) from the Executive Officer's November 20, 2003 Denial of Jurisdiction over CSEA's Request to Review Contracts between the Department of Health Services (DHS) and Hubbert Systems Consulting, Inc. and IBM Corporation.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

10:45 – 11:00 10. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

11:00 – 11:30 11. ORAL ARGUMENT

Oral Argument in the matter of **PAUL H. KEMP, CASE NO. 01-2841.** Appeal from dismissal. Department of the Youth Authority.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

11:30 - 11:45 12. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

12:00 - 1:00 LUNCH

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

1:00 – 1:30 13. ORAL ARGUMENT
Oral Argument in the matter of **KEVIN FRAZIER, CASE NO. 03-0736.** Appeal from a one-step reduction in salary for six months. Department of Corrections.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

1:30 – 1:45 14. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

1:45 – 2:15 15. ORAL ARGUMENT
Oral Argument in the matter of **NANCY SEARS, CASE NO. 02-2444.** Appeal from two-step reduction in salary for 12 months and transfer/reassignment. Department of Corrections, Sacramento.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

2:15 – 2:30 16. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS,

AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

2:30 – 3:00 17. ORAL ARGUMENT
Oral Argument in the matter of **PHUONG VU, CASE NO. 03-1145.** Appeal from dismissal. Department of Transportation.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

3:00 – 3:15 18. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

3:15 – 4:15 19. HEARING - **OFFICE OF THE INSPECTOR GENERAL**
Resolution to abolish eligible lists created by the Office of the Inspector General and to void two appointments.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

4:15 – 4:30 20. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS
Deliberations to consider matter submitted at prior hearing. [Government Code Sections 11126(d), 18653.]

A D J O U R N M E N T

CALIFORNIA STATE PERSONNEL BOARD MEETING*
801 Capitol Mall
Sacramento, California

Public Session Location - Room 150

Closed Session Location - Room 141

CONCURRENT BOARD MEETING AGENDA**

MAY 5, 2004

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

8:25 - 8:30 1. ROLL CALL

8:30 - 9:00 2. ORAL ARGUMENT
Oral Argument in the matter of **ROSIE L. DASHIELL, CASE NO. 03-2279.** Appeal from dismissal. California Highway Patrol.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

9:00 - 3. DELIBERATION ON ADVERSE ACTION, DISCRIMINATION COMPLAINT, AND OTHER PROPOSED DECISIONS SUBMITTED BY ADMINISTRATIVE LAW JUDGES
Deliberations on matters submitted at prior hearing, on proposed decisions, petitions for rehearing, rejected decisions, remanded decisions, submitted decisions, and other

* Sign Language Interpreter will be provided for Board Meeting upon request – contact Secretariat at (916) 653-0429, or CALNET 453-0429, TDD (916) 654-2360.

** The Agenda for the Board can be obtained at the following Internet address: **http://www.spb.ca.gov/calendar.htm**

matters related to cases heard by administrative law judges of the State Personnel Board or by the Board itself. [Government Code Sections 11126 (d), and 18653 (2).]

4. PENDING LITIGATION
Conference with legal counsel to confer with and receive advice regarding pending litigation when discussion in open session would be prejudicial. [Government Code Sections 11126 (e)(1), 18653.]

State Personnel Board (SPB) v. Department of Personnel Administration (DPA)/ International Union of Operating Engineers (IUOE et al. Sacramento County Superior Court Case No. 01CS00109

Association of California State Attorneys and Administrative Law Judges v. DPA/California Department of Forestry Employees Association (ASKA) CDF Firefighters Court of Appeal, Third district No. C034943
Sacramento County Superior Court No. 99CS03314)

IUOE v. SPB/Public Employee Relations Board (PERB)
Unfair Practice Case No. SA-CE-1295-S

Connerly v. SPB

5. RECOMMENDATIONS TO THE LEGISLATURE
Deliberations on recommendations to the Legislature. [Government Code Section 18653.]

6. RECOMMENDATIONS TO THE GOVERNOR
Deliberations on recommendations to the Governor. [Government Code Section 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

On Adjournment:

7. DISCUSSION OF COMING BOARD MEETING SCHEDULE OF MAY 18, 2004, IN SACRAMENTO, CALIFORNIA

BOARD ACTIONS

8. ADOPTION OF THE STATE PERSONNEL BOARD SUMMARY MINUTES OF APRIL 20, 2004

9. ACTION ON SUBMITTED ITEMS
(See Agenda Page 19)
These items have been taken under submission by the State Personnel Board at a prior meeting and may be before the Board for a vote at this meeting. This list does not include evidentiary cases, as those cases are listed separately by category on this agenda under Evidentiary Cases.

10. EVIDENTIARY CASES
The Board Administrative Law Judges conducts Evidentiary hearings in appeals that include, but are not limited to, adverse actions, medical terminations, demotions, discrimination, reasonable accommodations, and whistleblower complaints.

A. BOARD CASES SUBMITTED
These cases have been taken under submission by the State Personnel Board at a prior meeting and may be before the Board for a vote at this meeting.

DORYANNA ANDERSON-JOHNSON, CASE NO. 00-1687A
Appeal from denial of reasonable accommodation
Correctional Lieutenant
California Rehabilitation Center - Norco
Department of Corrections

LANA G. ANDREWS, CASE NO. 04-0316
Appeal from suspension
Officer
California Highway Patrol

TIMOTHY BOBITT, CASE NO. 02-2856
Appeal from suspension
Senior Special Agent in Charge
Department of Justice at Sacramento

RICHARD COELHO, CASE NO. 02-1796R
Appeal from constructive medical termination
Fish and Game Warden
Department of Fish and Game

RANDALL DODSON, Case No. 03-1587
Appeal from non-punitive termination
Caltrans Equipment Operator I
Department of Transportation

CYNTHIA GEORGE, CASE NO. 03-2494
Appeal from suspension
Administrative Law Judge I
Unemployment Insurance Appeals Board

THEODORE HUGHING, CASE NO. 03-0354
Appeal from Medical Termination
Food Service Supervisor I
Department of Developmental Services

MAMIE JONES, CASE NO. 02-4441
Appeal from ten-percent reduction
in salary for five months
Dispatcher Clerk with the
Department of Transportation

NEIL MADDEN, CASE NO. 03- 1682
Appeal from five percent reduction in
salary for three months
Correctional Officer
Centinela State Prison – Imperial
Department of Corrections

ALICE VAN-THU, CASE NO. 03-0413
Appeal from automatic resignation
Administrative Support Coordinator I
California State University – Monterey Bay

BEVERLY WILSON, CASE NO. 03-1150A
Appeal from dismissal
Administrative Support Assistant II
California State University - Carson

B. CASES PENDING

- Oral Arguments
  These cases are on calendar to be argued at this meeting or to be considered by the Board in closed session based on written arguments submitted by the parties.

ROSIE L. DASHIELL, CASE NO. 03-2279
Appeal from dismissal
California Highway Patrol.

KEVIN FRAZIER, CASE NO. 03-0736
Appeal from a one-step reduction in salary for six months
Department of Corrections

PAUL H. KEMP, CASE NO. 01-2841
Appeal from dismissal
Department of the Youth Authority.

CHRISTOPHER MIRAMONTES, CASE NO. 03-2299
Appeal from five-percent reduction in salary for six months. Department of Corrections.

PHUONG VU, CASE NO. 03-1145
Appeal from dismissal
Department of Transportation.

NANCY SEARS, CASE NO. 02-2444
Appeal from two-step reduction in salary for 12 months and transfer/reassignment
Department of Corrections, Sacramento

C. CHIEF COUNSEL RESOLUTIONS

- Court Remands
  These cases have been remanded to the Board by the court for further Board action.

  NONE

- Stipulations
  These stipulations have been submitted to the Board for Board approval, pursuant to Government Code, section 18681.

  NONE

D. ADMINISTRATIVE LAW JUDGE'S (ALJ) PROPOSED DECISIONS

- Proposed Decisions
  These are ALJ proposed decisions submitted to the Board for the first time.

  PEDRO BARRA, CASE NO. 03-2690
  Appeal from dismissal
  Officer
  California Highway Patrol

  MARY BASHAM, CASE N0. 04-0327
  Appeal from five-working-days suspension
  Student Services Professional II
  California State University - Sonoma

  PHILLIP BROWN, CASE NO. 03-3341
  Appeal from dismissal
  Janitor
  Employment Development Department

  RICHARD CAMPS, CASE NO. 03-1909
  Appeal from two-working-days suspension
  Special Agent Supervisor
  Bureau of Narcotic Enforcement
  Department of Justice

RALPH COLUNGA Case No. 03-3042
Appeal from formal reprimand
Correctional Sergeant
California State Prison - Los Angeles County
Department of Corrections

GARY CORNWELL, CASE NO. 00-0457
Appeal from dismissal
Officer
California Highway Patrol

DANIEL DAVIS, CASE NO. 03-2055E
Appeal from denial of request for reasonable accommodation and of disability discrimination
Associate Administrative Analyst
Department of Housing and Community Development

RAMIRO DURAZO, CASE NO. 04-0170
Appeal from ten-work-days suspension
Officer
California Highway Patrol

JACQUELYN McCARVER, CASE NO.
Appeal from demotion
Correctional Sergeant
Rainbow Conservation Center - Fallbrook
Department of Corrections

LEIJANE OGAWA, CASE NO. 03-2943E
Appeal from discrimination
Office Assistant (General)
Department of Transportation

KARMEN PERRY, CASE NO. 03-2107
Appeal from five-percent reduction salary for twelve months
Correctional Officer
Northern Transportation Unit - Tracy
Department of Corrections

NICOLE PRESTON-OWENS, CASE NO. 03-2100
Appeal from demotion
Program Technician II
Department of Housing and Community Development

DONALD REVELS, CASE NO. 03-2370
Appeal from ten-percent reduction in salary for twelve pay periods
Youth Correctional Counselor
Department of the Youth Authority

SANDRA SALAZAR, CASE NO. 03-2538
Appeal from five-percent reduction in salary for six months
Fire Apparatus Engineer
Department of Forestry and Fire Protection

JANE SORIA, CASE NO. 04-0274
Appeal from official reprimand
Correctional Case Records Supervisor
Department of Corrections

FLOYD WALL, CASE NO. 04-0134
Appeal from five-percent reduction in salary for three months
Correctional Sergeant
Richard J. Donovan Correctional Facility – San Diego
Department of Corrections

HARVEY WHALEN, CAE NO. 03-2655
Appeal from a two-months suspension
Caltrans Heavy Equipment Mechanic
Department of Transportation

GARY S. WHALEY, CASE NO. 03-1420E
Appeal from discrimination
Employment Program Representative
Employment Development Department

- Proposed Decisions Taken Under Submission At Prior Meeting

These are ALJ proposed decisions taken under submission at a prior Board meeting, for lack of majority vote or other reason.

NONE

- Proposed Decisions After Board Remand

NONE

- Proposed Decisions After SPB Arbitration

NONE

E. PETITIONS FOR REHEARING

- ALJ Proposed Decisions Adopted By The Board
  The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a case already decided by the Board.

DAVID FOX, CASE NO. 03-3458P
Appeal from dismissal
Stationary Engineer
Richard J. Donovan Correctional Facility – San Diego
Department of Corrections
Petition for rehearing filed by appellant
To be granted or denied.

MARTIN HERNANDEZ, CASE NO. 02-4449P
Appeal from demotion
Correctional Sergeant
Calipatria State Prison – Imperial
Department of Corrections
Petition for rehearing filed by appellant
to be granted or denied

MARIO SAENZ, CASE NO. 03-3102P
Appeal from non-punitive dismissal
Correctional Officer
California State Prison – Corcoran
Department of Corrections
Petition for rehearing filed by appellant
to be granted or denied

JEANNE M. THOMPSON, CASE NO. 03-2725P
Appeal from demotion
Senior Psychiatric Technician (Safety)
Department of Mental Health
Petition for rehearing filed by appellant
to be granted or denied

- Whistleblower Notice of Findings
  The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a Notice of Findings issued by the Executive Officer under Government Code, section 19682 et seq. and Title 2, California Code of Regulations, section 56 et seq.

  NONE

F. PENDING BOARD REVIEW
These cases are pending preparation of transcripts, briefs, or the setting of oral argument before the Board.

ANDREW CIRNER, CASE NO. 03-2241E
Appeal from denial of request for reasonable accommodation
Senior Psychiatric Technician
Department of Mental Health

NICHOLAS COMAITES, CASE NO. 03-0062
Appeal from official reprimand
Correctional Counselor II
Department of Corrections
AND
PAUL WARD, CASE NO.03-0332
Appeal from official reprimand
Correctional Administrator
Department of Corrections

ROSIE L. DASHIELL, CASE NO. 03-2279
Appeal from dismissal
Public Safety Dispatcher I
California Highway Patrol

KEVIN FRAZIER, CASE NO. 03-0736
Appeal from a one-step reduction in salary for six months
Correctional Officer
California State Prison, San Quentin
Department of Corrections

SHANNON FROEMING, CASE NO. 03-2871E
Appeal from denial of request for reasonable accommodation
Employment Program Representative
Employment Development Department

RONALD GALI, CASE NO. 03-0462
Appeal from dismissal
Native American Spiritual Leader
Folsom State Prison - Represa
Department of Corrections

MARY HUTTNER, CASE NO. 02-1690
Appeal from demotion
Staff Services Manager I to the position of Associate Health Program Advisor (top step)
Department of Health Services

CONNIE JAMES, CASE NO. 03-3136
Appeal from 15-working days' suspension
Accounting Technician
Employment Development Department

CONNIE JOHNSON, CASE NO. 03-2620
Appeal from 30-calendar-days suspension
Employment Program Representative
Employment Development Department

PAUL H. KEMP, Case No. 01-2841
Appeal from dismissal
Teacher Assistant - Youth Correctional Reception Center and Clinic - Sacramento
Department of the Youth Authority

JENNIFER KILL, CASE NO. 02-2164B
Appeal for determination of back salary, benefits and interest
Supervising Cook
California Correctional Institution - Tehachapi
Department of Corrections

NEIL MADDEN, CASE NO. 03- 1682
Appeal from five-percent reduction
in salary for three months
Correctional Officer
Centinela State Prison – Imperial
Department of Corrections at Imperial

DONNA MARTINEZ, CASE NO. 03-2232
Appeal from dismissal
Material & Stores Supervisor I
Central California Women's Facility,
Department of Corrections

RAY MARTINEZ, CASE NO. 03-3344
Appeal from dismissal
Correctional Officer
Substance Abuse Treatment Facility –
Corcoran
Department of Corrections

MARGARET A. MEJIA, CASE NO. 03-1848
Appeal from dismissal
Psychiatric Technician (Safety)
Department of Mental Health

CHRISTOPHER MIRAMONTES, CASE NO. 03-2299
Appeal from five-percent reduction in
salary for six months
Special Agent
Department of Corrections

MARYLAND PAGE, CASE NO. 03-3703
Appeal from five-percent reduction in
salary for twelve-months
Correctional Officer
Ironwood State Prison - Blythe
Department of Corrections

VIRGINIA PARKER, CASE NO. 03-0325
Appeal from demotion
Correctional Lieutenant
Ironwood State Prison – Blythe
Department of Corrections

NANCY SEARS, CASE NO. 02-2444
Appeal from two-step reduction in salary for 12 months and transfer/ reassignment
Parole Agent I (Adult Parole)
Department of Corrections - Sacramento

NANCY VALENTINO, Case No. 03-0699
Appeal from dismissal
Psychiatric Technician
Department of Developmental Services

ALICE VAN-THU, CASE NO. 03-0413
Appeal from automatic resignation
Support Administrative Coordinator I
California State University

PHUONG VU, CASE NO. 03-1145
Appeal from dismissal
Transportation Engineer (Civil)
Department of Transportation

BOBBY WANG, CASE NO. 02-2684
Appeal from dismissal
Motor Vehicle Field Representative
Department of Motor Vehicles

11. RESOLUTION EXTENDING TIME UNDER GOVERNMENT CODE SECTION 18671.1 EXTENSION
(See Agenda Page 22)

12. NON-EVIDENTIARY CASES

A. WITHHOLD APPEALS
Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

GINA BARBUTO, CASE NO. 03-1827
Correctional Officer
Department of Corrections

VLADIMIR BELTETON, CASE NO. 03-1504
Correctional Officer
Department of Corrections

JASON BURNS, CASE NO. 03-1843
Correctional Officer
Department of Corrections

JEFF HASKELL, CASE NO. 03-1826
Correctional Officer
Department of Corrections

REGINALD HODGES, CASE NO. 03-1755
Correctional Officer
Department of Corrections

ROSA LIMON, CASE NO. 03-1562
Medical Technical Assistant
Department of Corrections

MARIO MADUENO, CASE NO. 03-1735
Correctional Officer
Department of Corrections

ADAM ROMERO, CASE NO. 03-1869
Correctional Officer
Department of Corrections

GREGORY SHINN, CASE NO. 03-1409
Correctional Officer
Department of Corrections

MATTHEW TORRES, CASE NO. 03-1184
Correctional Officer
Department of Corrections

B. MEDICAL AND PSYCHOLOGICAL SCREENING APPEALS - NONE

Cases heard by a Staff Hearing Panel comprised of a managerial staff member of the State Personnel Board and a medical professional. The Board will be presented recommendations by a Hearing Panel on each appeal.

C. EXAMINATION APPEALS – NONE
MINIMUM QUALIFICATIONS – NONE
MERIT ISSUE COMPLAINTS – NONE
Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

D. RULE 212 OUT-OF-CLASS APPEALS – NONE
VOIDED APPOINTMENT APPEALS
RULE 211 APPEALS – NONE
Cases heard by a Staff Hearing Officer, or a managerial staff member of the State Personnel Board. The Board will be presented recommendations by a Staff Hearing Officer for final decision on each appeal.

(Voided Appointment Case)

RACHEL CHATT, CASE NO. 02-3249
Office Assistant (Typing)
Department of Corrections

E. REQUEST TO FILE CHARGES CASES – NONE
PETITIONS FOR REHEARING CASES – NONE
Investigated by Appeals Division staff. The Board will be presented recommendations by Appeals Division staff for final decision on each request.

F. PSYCHOLOGICAL SCREENING CASES – NONE
Cases reviewed by Appeals Division staff, but no hearing was held. It is anticipated that the Board will act on these proposals without a hearing.

13. NON-HEARING CALENDAR

The following proposals are made to the State Personnel Board by either the Board staff or Department of Personnel Administration staff. It is anticipated that the Board will act on these proposals without a hearing.

Anyone with concerns or opposition to any of these proposals should submit a written notice to the Executive Officer clearly stating the nature of the concern or opposition. Such notice should explain how the issue in dispute is a merit employment matter within the Board's scope of authority as set forth in the State Civil Service Act (Government Code Section 18500 et seq.) and Article VII, California Constitution. Matters within the Board's scope of authority include, but are not limited to, personnel selection, employee status, discrimination and affirmative action. Matters outside the Board's scope of authority include, but are not limited to, compensation, employee benefits, position allocation, and organization structure. Such notice must be received not later than close of business on the Wednesday before the Board meeting at which the proposal is scheduled. Such notice from an exclusive bargaining representative will not be entertained after this deadline, provided the representative has received advance notice of the classification proposal pursuant to the applicable memorandum of understanding. In investigating matters outlined above, the Executive Officer shall act as the Board's authorized representative and recommend the Board either act on the proposals as submitted without a hearing or schedule the items for a hearing, including a staff recommendation on resolution of the merit issues in dispute.

NONE PRESENTED

14. STAFF CALENDAR ITEMS FOR BOARD INFORMATION

Staff has approved the following:

NONE PRESENTED

15. CAREER EXECUTIVE ASSIGNMENT (CEA) CATEGORY ACTIVITY

This section of the Agenda serves to inform interested individuals and departments of proposed and approved CEA position actions.

The first section lists position actions that have been proposed and are currently under consideration.

Any parties having concerns with the merits of a proposed CEA position action should submit their concerns in writing to the Classification and Compensation Division of the Department of Personnel Administration, the Personnel Resources and Innovation Division of the State Personnel Board, and the department proposing the action.

To assure adequate time to consider objections to a CEA position action, issues should be presented immediately upon receipt of the State Personnel Board Agenda in which the proposed position action is noticed as being under consideration, and generally no later than a week to ten days after its publication.

In cases where a merit issue has been raised regarding a proposed CEA position action and the dispute cannot be resolved, a hearing before the five-member Board may be scheduled. If no merit issues are raised regarding a proposed CEA position action, and it is approved by the State Personnel Board, the action becomes effective without further action by the Board.

The second section of this portion of the Agenda reports those position actions that have been approved. They are effective as of the date they were approved by the Executive Officer of the State Personnel Board.

A. REQUESTS TO ESTABLISH NEW CEA POSITIONS CURRENTLY UNDER CONSIDERATION

(1) ASSISTANT DEPUTY DIRECTOR, CHILD SUPPORT SERVICES DIVISION
The California Department of Child Support Services proposes to allocate

the above position to the CEA category. The Assistant Director, Child Support Services Division is responsible for formulation, implementation and evaluation of DCSS programs, policies and procedures.

(2) DEPUTY DIRECTOR, ASSET MANAGEMENT PROGRAMS
The California Housing Finance Agency proposes to allocate the above position to the CEA category. The Deputy Director, Asset Management Programs is responsible for making policy decisions and recommendations on all Agency asset management issues.

(3) ASSISTANT DIRECTOR, HOMEOWNERSHIP PROGRAMS
The California Housing Finance Agency proposes to allocate the above position to the CEA category. The Assistant Director, Homeownership Programs is responsible for advising and assisting the Deputy Director in planning, organizing, and directing the home ownership program.

B. EXECUTIVE OFFICER DECISIONS REGARDING REQUESTS TO ESTABLISH NEW CEA POSITIONS

(1) CHIEF COUNSEL
The California Earthquake Authority's request to establish the above position to the CEA category has been approved effective April 7, 2004.

16. WRITTEN STAFF REPORT FOR BOARD INFORMATION

17. PRESENTATION OF EMERGENCY ITEMS AS NECESSARY

A D J O U R N M E N T

SUBMITTED

1. TEACHER STATE HOSPITAL (SEVERELY), ETC. Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002).

2. VOCATIONAL INSTRUCTOR (SAFETY)(VARIOUS SPECIALTIES). Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002).

3. TELEVISION SPECIALIST (SAFETY)
The Department of Corrections proposes to establish the new classification Television Specialist (Safety) by using the existing Television Specialist class specification and adding "Safety" as a parenthetical to recognize the public aspect of their job, additional language will be added to the Typical Tasks section of the class specification and a Special Physical Characteristics section will be added. (Presented to Board March 4, 2003).

4. PSC NO'S 03-09 & 03-10
Appeal of the California Department of Insurance from the Executive Officer's August 15, 2003, disapproval of contracts with Strumwasser & Woocher and Bartko, Zankel, Tarrant & Miller, for legal services in response to the review request filed by California Attorneys, Administrative Law Judges and Hearing Officers (CASE).
(Hearing held February 10, 2004).

NOTICE OF GOVERNMENT CODE § 18671.1 RESOLUTION

Since Government Code section 18671.1 requires that cases pending before State Personnel Board Administrative Law Judges (ALJ's) be completed within six months or no later than 90 days after submission of a case, whichever is first, absent the publication of substantial reasons for needing an additional 45 days, the Board hereby publishes its substantial reasons for the need for the 45-day extension for some of the cases now pending before it for decision.

An additional 45 days may be required in cases that require multiple days of hearings, that have been delayed by unusual circumstances, or that involve any delay generated by either party (including, but not limited to, submission of written briefs, requests for settlement conferences, continuances, discovery disputes, pre-hearing motions). In such cases, six months may be inadequate for the ALJ to hear the entire case, prepare a proposed decision containing the detailed factual and legal analysis required by law, and for the State Personnel Board to review the decision and adopt, modify or reject the proposed decision within the time limitations of the statute.

Therefore, at its next meeting, the Board will issue the attached resolution extending the time limitation by 45 days for all cases that meet the above criteria, and that have been before the Board for less than six months as of the date of the Board meeting.

GOVERNMENT CODE § 18671.1 RESOLUTION

WHEREAS, Section 18671.1 provides that, absent waiver by the appellant, the time period in which the Board must render its decision on a petition pending before it shall not exceed six months from the date the petition was filed or 90 days from the date of submission; and

WHEREAS, Section 18671.1 also provides for an extension of the time limitations by 45 additional days if the Board publishes substantial reasons for the need for the extension in its calendar prior to the conclusion of the six-month period; and

WHEREAS, the Agenda for the instant Board meeting included an item titled "Notice of Government Code § 18671.1 Resolution" which sets forth substantial reasons for utilizing that 45-day extension to extend the time to decide particular cases pending before the Board;

WHEREAS, there are currently pending before the Board cases that have required multiple days of hearing and/or that have been delayed by unusual circumstances or by acts or omissions of the parties themselves;

NOW, THEREFORE, BE IT RESOLVED AND ORDERED that the time limitations set forth in Government Code section 18671.1 are hereby extended an additional 45 days for all cases that have required multiple days of hearing or that have been delayed by acts or omissions of the parties or by unusual circumstances and that have been pending before the Board for less than six months as of the date this resolution is adopted.

*** * * * ***

CALIFORNIA STATE PERSONNEL BOARD
GRAY DAVIS, Governor
801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov

(Cal. May 4-5, 2004)

TO: Members
State Personnel Board

FROM: State Personnel Board - Legislative Office

SUBJECT: LEGISLATION

The status of major legislation being followed for impact on Board programs and the general administration of the State Civil Service Merit System is detailed in the attached report.

Any legislative action that takes place after the printing of this report, which requires discussion with the Board, will be covered during the Board meeting. Please note: All bills that are being tracked by the Legislative Office are listed. The Board may not have taken a position on each bill.

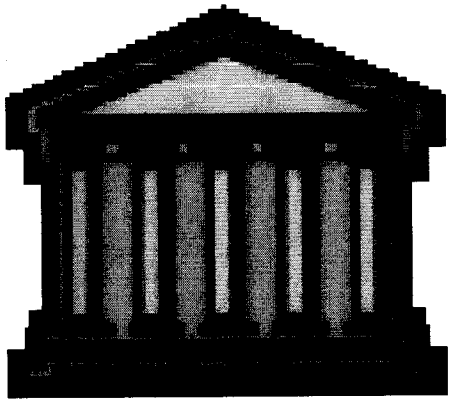
Please contact me directly should you have any questions or comments regarding this report. I can be reached at (916) 653-0453.

Sherry A. Hicks
Director of Legislation

Attachment

LEGISLATIVE TRACKING REPORT 2003-2004 SESSION

Status as of April 21, 2004



(Note: Only bills with positions have been reviewed/approved by the Board)

ASSEMBLY BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

BILL/ AUTHOR	BOARD POSITION	SUBJECT	ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	SEN POLICY	SEN FISCAL	PASSED SENATE	ENROLLED	SIGNED	VETOED
AB 25 Nunez	NEUTRAL	AB 25, with certain exceptions, require state agencies to accept as valid identification of a person, a photo identification card issued by another nation to its citizens or nationals	A	A	A	A	A	I			
AB 76 Corbett	SUPPORT	This bill would clarify and expand the legal protections of the Fair Employment and Housing Act (FEHA) by specifying that employers may be liable for harassment committed against their employees by non-employees, if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.	A	A	A	A	A	A	A	Chapter #671	
AB 79 Dutra	NEUTRAL	AB 79 would suspend requirements for state departments and local agencies to prepare and submit various reports to the Legislature or the Governor until January 1, 2008. (This bill was amended on 3/25/04)	A	A	A	A	A	P			
AB 159 Jerome Horton	NEUTRAL	AB 159 allows state employees who have been disciplined by their appointing powers to split their causes of action and have two separate trials; one before the State Personnel Board (SPB) and the second before an arbitrator or state or federal court to review discrimination cases that could have been, but were not released during the disciplinary appeal before SPB.	A	A	A	A	A	DEAD			

ASSEMBLY BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

BILL/ AUTHOR	BOARD POSITION	SUBJECT	ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	SEN POLICY	SEN FISCAL	PASSED SENATE	ENROLLED	SIGNED	VETOED
AB 196 Leno	NEUTRAL	AB 196 would amend the Fair Employment and Housing Act (FEHA) to add "gender" to the list of classes protected by FEHA's anti-discrimination provisions by including gender as defined in the California Penal Code Section 422.76 in the FEHA definition of "sex". Gender is defined in the cited Penal Code section to include not only the individual's actual sex, but also his/her perceived sex based on identity, appearance or behavior.	A	A	A	A	A	A	A	Chapter #164	
AB 268 Mullin	SUPPORT	AB 268 would amend the Government Code to add training in employment law relating to persons with disabilities as part of the current 80 hours of required training for new supervisors.	A	A	A	A	A	A	A	Chapter #165	
AB 292 Yee	SUPPORT	AB 292 would add language to various California Codes to prohibit the use of children as interpreters for any agency, organization, entity, or program that receives state funding. Additionally, the bill would result in the loss of funding and/or cancellation of contracts for any violation, until such time as specific corrective action is taken.	A	A	A	A	A	I			
AB 577 Horton	SUPPORT	This bill would require the State Personnel Board (SPB) to adopt a regulation that would provide for blanket waivers (subject to standards determined by the Board), which would allow an employee who has been dismissed from State service to compete in any future State civil service examination; and would require providing dismissed employees with written notification explaining the effect of dismissal and the process by which a dismissed employee can compete in civil service examinations.	A	A	A	A	A	A	A	Chapter #836	

ASSEMBLY BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

			ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	SEN POLICY	SEN FISCAL	PASSED SENATE	ENROLLED	SIGNED	VETOED
AB 703 Dymally	NEUTRAL	AB 703 would define "racial discrimination" and "discrimination on the basis of race" as having the same meaning as the definition contained in the *International Convention on the Elimination of All Forms of Racial Discrimination* for purposes of interpreting the provisions of Section 31 of Article I of the California Constitution. In doing this, the bill would allow special measures be taken for the "adequate advancement" of racial groups requiring protection.	A	A	A	A	A	A	A	Chapter # 211	
AB 1209 Nakano	NEUTRAL	AB 1209 would amend Government Code section 11126 to clarify and make permanent existing provisions that authorize state bodies to hold closed sessions to consider matters posing a threat of criminal or terrorist activity against state buildings or property.	A	A	A	A	A	A	A	Chapter #8	
Koretz AB 1583		This bill would prohibit a state agency, including the California State University, from employing a primary care physician as an independent contractor when there is an unfilled, full-time primary care physician position available within the state agency, *unless the state agency is unable to do so after a good faith effort*	A	A	A	A	A	A	I		
AB 1669 Chu	SUPPORT	AB 1669 revises the education requirements for physicians and psychologists who perform fitness for duty evaluations and pre-employment screening for peace officers.	A	A	A	A	A	A	A	Chapter #777	
AB 1825 Reyes	NEUTRAL	This bill would require employers with 3 or more employees to post, as specified, information concerning the illegality of sexual harassment and the remedies available to victims of sexual harassment and would require employers with 50 or more employees to provide 2 hours of training and education to all supervisory employees within one year of January 1, 2005, unless the employer has provided sexual harassment training and education to employees after January 1, 2004.	A	P							

ASSEMBLY BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

BILL/ AUTHOR	BOARD POSITION	SUBJECT	ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	SEN POLICY	SEN FISCAL	PASSED SENATE	ENROLLED	SIGNED	VETOED
AB 1827 Cohn	NEUTRAL	Creates a new exception to both state and local government open meeting laws that would allow state and local government bodies to meet in closed session for the purpose of discussing a confidential final draft audit report from the Bureau of State Audits.	P								
AB 1933 Pacheco	NEUTRAL	This bill would, among other things, extend the time for a public agency to respond to a request for public records from 10 to 20 days.	P								
AB 2075 Benoit		Authorizes the DMV to conduct criminal history background checks on current and prospective employees.	A								
AB 2275 Dymally	SUPPORT	This bill would repeal those sections of the Government Code that is outdated with the inception of Proposition 209. In addition, it clarifies the responsibilities of State agencies EEO program. (Board sponsored)	A								
AB 2314 Horton	NEUTRAL	This bill would make the same burden of proof in discipline cases involving managerial employees, as currently exists for non-managerial employees.	A								
AB 2408 Yee		This bill would require the survey and report to include additional information, and, if deficiencies in bilingual staffing are identified, would require state agencies to fill public contact jobs with qualified bilingual staff, unless exempted by the board, as specified.	A	P							

ASSEMBLY BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

BILL/ AUTHOR	BOARD POSITION	SUBJECT	ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	SEN POLICY	SEN FISCAL	PASSED SENATE	ENROLLED	SIGNED	VETOED
AB 2662 Jackson		This bill would require the Governor and the Legislature to implement the principles underlying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by addressing discrimination against women and girls, as specified, and would require the Governor to evaluate state agencies and departments to ensure that the state does not discriminate against women through the allocation of funding and the delivery of services.	A	P							
AB 2750 Steinberg		This bill would state the intent of the Legislature to implement the rulings of Biggs v. Wilson (9th Cir. 1993) 1 F.3d 1537 and White v. Davis (2003) 30 Cal.4th 528 as part of the statutory law of the state.	A	P							
AB 2889 Laird	NEUTRAL	This bill would make employers responsible for the acts of non-employees with respect to all forms of harassment in the workplace where the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.	P								
AB 2900 Laird	SUPPORT	This bill would state the intent of the Legislature to enact legislation to address employment discrimination issues.	P								
AB 2959 Bates		This bill would express the intent of the Legislature to enact legislation to reorganize the management functions of state government, through consolidating the functions of the Department of Finance, the Department of General Services, and the Department of Personnel Administration. "Spot Bill"	P								
AB 3007		Makes changes to the Ralph A. Brown Act: Notice of Meetings	P								
ACA 27 Campbell		This measure would declare that, in addition, it is the intent of the Legislature to reorganize state government.	P								

SENATE BILLS (Tracking)

STATUS CODE
A – Approved
H – Held
P – Pending
F – Failing
I – Inactive
D – Died in Committee

BILL/ AUTHOR	BOARD POSITION	SUBJECT	SEN POLICY	SEN FISCAL	PASSED SENATE	ASSEM POLICY	ASSEM FISCAL	PASSED ASSEMBLY	ENROLLED	SIGNED	VETOED
SCA 1 Burton	NEUTRAL	This bill proposes to amend the California Constitution as it relates to public meetings and access to documents	A	A	A	A	A	A	A	Chapter #1	
SB 99 Burton	SUPPORT	SB 99 authorizes the Legislative Counsel Bureau (LCB) to consolidate its information technology (IT) classes into non-traditional "band" classes and salary ranges. Additionally, this bill authorizes LCB to test for these IT classes on an individual position basis, as opposed to the traditional approach of testing by broad job classification.	A	A	A	A	A	A	A	Chapter #528	
SB 434 Escutia	SUPPORT	SB 434 provides that, at the request of a prosecuting attorney or the Attorney General, the head of every state department may assist in conducting investigations of matters of unlawful activity under the department's jurisdiction. It also makes various changes to the manner in which such investigations are conducted and the scope of the investigating department's powers.	A	A	A	A	P	A	A	Chapter #876	
SB 1892 Burton		This bill would repeal the provision of law of law that authorizes an employee organization that represents state employees to request the board to determine whether a proposed personal service contract, of a type that the state agency is not required to notify the board of its intention to enter into, is permitted by law.	A								
SCA 15 McClintock	OPPOSE	This measure would authorize the Governor to require any state agency to contract out the performance of state activities or tasks to the private sector that otherwise may be performed by persons selected through the state civil service if the Governor determines that terms more favorable to the state may be so obtained.	P								

CALIFORNIA STATE PERSONNEL BOARD
801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov
ARNOLD SCHWARZENEGGER, Governor

MEMORANDUM

Date: April 16, 2004

To: Members of the State Personnel Board

From: Karen J. Brandt, Senior Staff Counsel KJB
State Personnel Board

Reviewed: Elise S. Rose, Chief Counsel
State Personnel Board

Subject: PSC Nos. 04-01 and 04-02: Appeal of the California State Employees Association from the Executive Officer's November 20, 2003 Denial of Jurisdiction over CSEA's Request to Review Contracts between the Department of Health Services and Hubbert Systems Consulting, Inc. and IBM Corporation

REASON FOR HEARING

The California State Employees Association (CSEA) has appealed to the State Personnel Board (SPB or Board) from the Executive Officer's decision dated November 20, 2003 denying jurisdiction over CSEA's request that SPB review contracts (Contracts) between the Department of Health Services (DHS) and Hubbert Systems Consulting, Inc. (Hubbert) and IBM Corporation (IBM) (collectively, the Contractors.) (A copy of the Executive Officer's decision is attached hereto as Attachment 1.) These matters have been consolidated for decision.

BACKGROUND

The Contractors are vendors listed with the Department of General Services (DGS) under the California Multiple Award Schedule (CMAS). Vendors included in CMAS are authorized to take purchase orders from state agencies for the purchase of their products and services under the CMAS system. The Contracts in this matter are a series of purchase orders that DHS submitted to the Contractors under the CMAS system beginning in or about March 2001. All of the purchases of products and services made under these Contracts were completed before CSEA submitted its requests for review to SPB in July 2003. In other words, the terms of the Contracts that CSEA has asked SPB to review had expired and the Contracts were no longer in effect when SPB was asked to review them.

PROCEDURAL HISTORY

By two separate letters dated July 17, 2003, CSEA asked SPB to review the Contracts for compliance with Government Code § 19130.

On September 2, 2003, DHS submitted its responses to CSEA's review requests.

On September 15, 2003, CSEA submitted its reply.

On November 20, 2003, the Executive Officer issued his decision finding that SPB did not have jurisdiction to review the Contacts. (Attachment 1)

APPEAL BRIEFS

On December 24, 2003, CSEA appealed to the Board from the Executive Officer's decision.

CSEA filed its opening brief dated February 10, 2004. (Attachment 2)

DHS filed its response dated March 11, 2004. (Attachment 3)

CSEA filed its reply dated March 19, 2004. (Attachment 4)

ISSUE

This matter presents the following issue for the Board's review:

> Does SPB have jurisdiction to review for compliance with Government Code section 19130 personal services contracts that expired before CSEA requested SPB review?

SUMMARY OF POSITIONS

The parties' full arguments on these issues are contained in the Attachments and the Board's file. Set forth below is a summary of their arguments.

SPB's Jurisdiction

Government Code section 19132 provides:

> The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in

accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution.

CSEA's Position

CSEA asserts that SPB does not have the authority to impose a time limit by which an employee organization must submit its request for review of a personal services contract for the following reasons:

1) The Legislature has created two different processes for SPB review of personal services contracts depending on whether those contracts are cost-savings contracts entered into under Government Code section 19130, subdivision (a), or exceptions contracts entered into under section 19130, subdivision (b). For cost-savings contracts, the Legislature explicitly provided in Government Code section 19131 that a department must give SPB prior notice of its intension to enter into the contract.[1] When SPB receives notice of a proposed cost-savings contract, it must immediately notify the affected employee union of the contract, and the union has 10 days to submit a request for review. The procedures for reviewing exceptions contracts, including the Contracts challenged in this case, are very different. Government Code section 19132 does not require that a department give SPB prior notice of its intension to enter into an exceptions contract, and imposes no time limits on when a union may request that SPB review an exceptions contract. Given this statutory scheme created by the Legislature, it clearly would be improper for the Executive Officer to construe section 19132 as imposing an implied notice requirement on state agencies. Similarly, it is improper for the Executive Officer to construe section 19132 as imposing an implied time limit on the unions.

---

[1] Government Code section 19131, in relevant part, provides:

> Any state agency proposing to execute a contract pursuant to subdivision (a) of Section 19130 shall notify the State Personnel Board of its intention. All organizations that represent state employees who perform the type of work to be contracted, and any person or organization which has filed with the board a request for notice, shall be contacted immediately by the State Personnel Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract. ... Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 10337 of the Public Contract Code. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

2) Civil Code section 1661 defines an "executed contract" to be "one, the object of which is fully performed." Although the Contracts were fully performed by the time CSEA challenged them, they nonetheless were and continue to be "executed contracts" and, thus, subject to review under section 19132.

3) If the Board wishes to impose a time limit upon a union's submission of a contract review request, that time limit should be the statute of limitations period set forth in Code of Civil Procedure section 337, subdivision (1), which gives a party to a contract 4 years to sue for damages after a contract has been completed and the final payment has been received.

4) The equitable doctrine of laches does not apply in this case because CSEA did not unreasonably delay in requesting SPB review of the Contracts – it requested SPB review as soon as it learned of the Contracts' existence. In addition, DHS cannot show prejudice – under the law, DHS will have no monetary liability to the union even if it were to lose in this matter.

DHS's Position

DHS asserts that the decision of the Executive Officer should be sustained for the following reasons:

1) The Board should not look to Civil Code section 1661 to determine the meaning of the term "executed" as used in section 19132. That Civil Code section is an ancient and archaic provision in an entirely different code from the provisions relevant in this case. It is clear from the context of the relevant statutes that "executed" means that stage in the formation of a contract when the agreement has been approved and is in effect. Every contract entered into under section 19130 that has now expired was, at one point, "executed" and, prior to that point, was "proposed," as those terms are used section 19132. CSEA's contention that "executed" means a contract that has been fully performed would lead to the absurd result that SPB review of exceptions contracts under section 19132 could occur only before contracts are in effect and after they are fully performed, and not while they are in effect and being performed.

2) The equitable doctrine of laches should be applied in this case. CSEA does not have a reasonable excuse as to why it did not challenge the Contracts in a timely manner.

Executive Officer's Decision

In his November 20, 2003 decision, the Executive Officer found that SPB did not have jurisdiction to review the Contracts in this case, in relevant part, as follows:

> In order to determine whether SPB should review the expired Contracts in this case, the intent of the Legislature when it included the term "executed" in Government Code § 19132 must be determined. We have not found any legislative history that would help us with this inquiry. We must, therefore, ascertain the intent of Legislature from all the circumstances surrounding the statute's enactment to effectuate the purpose of the law.
>
> The purpose of the law is to ensure that the State utilizes state civil service employees to perform the State's work if State employees can do so adequately and competently.[2] In order to best effectuate the purpose of the law, it appears that Government Code § 19132 should be interpreted to apply only to those contracts that have a current impact on the conduct of the State's on-going workload. Therefore, I find that the term "executed" as it is used in Government Code § 19132 should be interpreted to mean a contract that has been entered into but has not yet expired as of the date the employee organization requests SPB review. While I recognize that contracts that are current at the time SPB's review is requested may expire before that review is completed, such contracts are very different from contracts that have already expired before SPB review is requested. As DHS points out, if a State agency is given notice that an existing contract is being challenged, the agency can take action to address and mitigate any liability that may accrue by terminating the contract and redirecting the work to civil service employees or negotiating with the union for a solution that is acceptable to both parties. If the contract has already expired, the State agency has no opportunity to mitigate any potential liability it may have.
>
> If CSEA's position were adopted and SPB were required to review expired contracts, in addition to proposed and existing contracts, both SPB and state agencies would be saddled with an unlimited burden; employee organizations could reach back indefinitely in time and invoke SPB's review of contracts that no longer have any current impact upon the performance of the State's on-going work.

---

[2] See, Professional Engineers In California Government v. Department of Transportation (1997) 15 Cal.4th 543

In this time of budget crisis and employee lay-offs, SPB does not have the staff or the resources to review contracts that have already expired.

While we understand that the fact that Government Code § 19132 does not require prior notice to either SPB or affected employee organizations before a Government Code § 19130(b) contract may be executed may make it difficult for employee organizations to discover and challenge a Government Code §19130(b) contract Employee unions must either seek to change the statute or work with state agencies to obtain from them any prior notice the employee organizations may desire.[3]

[3] We understand that some employee organizations have negotiated MOU provisions that provide them with prior notice of 19130(b) contracts.

ATTACHMENT INDEX

[CSEA-DHS-04-01 and -02-Bd item]

ATTACHMENT "1"

CALIFORNIA STATE PERSONNEL BOARD
801 Capitol Mall • Sacramento, CA 95814

November 20, 2003

Melinda L. Williams
Attorney
California State Employees Association
1108 "O" Street
Sacramento, CA 95814

Dear Ms. Williams:

CSEA'S REQUEST FOR REVIEW OF CONTRACTS BETWEEN DEPARTMENT OF HEALTH SERVICES AND HUBBERT SYSTEMS CONSULTING INC. [SPB FILE NO. 03-012(b) AND IBM CORPORATION SPB FILE NO. 03-013(b)]

By letter dated July 17, 2003, the California State Employees Association (CSEA) asked the State Personnel Board (SPB) to review for compliance with Government Code § 19130 contracts that the Department of Health Services (DHS) had entered into with Hubbert Systems Consulting, Inc. (Hubbert) for information technology services [SPB File No. 03-012(b)]. By a separate letter dated July 17, 2003, CSEA asked SPB to review for compliance with Government Code § 19130 contracts that DHS had entered into with IBM Corporation (IBM) for information technology services [SPB File No. 03-013(b)]. (Hubbert and IBM are collectively referred to herein as the Contractors.) These two files have been consolidated for decision.

From the information submitted by the parties, it appears that the Contractors are vendors listed with the Department of General Services (DGS) under the California Multiple Award Schedule (CMAS). Vendors included in CMAS are authorized to take purchase orders from State agencies for the purchase of their products and services under the CMAS system.

DHS has provided to SPB copies of the purchase orders that they submitted to the Contractors under the CMAS system beginning in March 2001. A review of the submitted purchase orders show that all of the purchases of products and services made under these purchase orders were completed before CSEA submitted its requests for review to SPB in July 2003. In other words, all the purchase orders that CSEA has asked SPB to review expired before SPB was asked to review them.

DHS asserts that SPB cannot review contracts that expired before SPB's review is requested. CSEA disagrees.

Even though the purchase orders were issued under the CMAS system, each purchase order is a separate contract for the purposes of SPB's review under Government Code § 19130.[1] SPB has not been provided with any Government Code § 19130 justifications with respect to the purchase orders.[2] Even if DHS may not have been required by DGS to provide Government Code § 19130 justifications before issuing the challenged purchase orders under CMAS, it appears that, to the extent that the purchase orders procured personal services from the Contractors, the purchase orders were issued pursuant to the authority set forth in Government Code § 19130(b). Nowhere in any of the documents submitted to SPB does DHS assert otherwise.

If the purchase orders were executed under the authority set forth in Government Code § 19130(b), the procedures set forth in Government Code § 19132 and Public Contract Code § 10337(c) apply. Government Code § 19132 provides that:

> The State Personnel Board, at the request of an employee organization that represents State employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution. (Underlining added.)

Public Contract Code § 10337, in relevant part, provides:

---

[1] See SPB Rule 547.59, Title 2, California Code of Regulations, § 547.59, which defines a "personal services contract" to be "any contract, requisition, purchase order, etc. (except public works contracts) under which labor or personal services is a significant, separately identifiable element." (Underlining added.)

[2] See SPB Rule 547.60, Title 2, California Code of Regulations § 547.60, which provides:

> Standard and Control for Approval of Contracts. When a state agency requests approval from the Department of General Services for a contract let under Government Code Section 19130(b), the agency shall include with its contract transmittal a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code Section 19130(b).

If a state agency executes an agreement to obtain personal services under the authorization set forth in Government Code § 19130, a 19130 justification under SPB Rule 547.60 should be provided, whether the agency is entering into a separate contract or issuing a purchase order under CMAS.

> (c) A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code...

As CSEA explains in its submissions, the procedures for reviewing cost-savings contracts executed under Government Code § 19130(a) are very different from those for reviewing exceptions contracts executed under Government Code § 19130(b). Pursuant to Government Code § 19131 and Public Contract Code § 10337(b), a State agency must give SPB notice of its proposed cost-savings contract and SPB, in turn, must give affected employee organizations notice of the proposed contract and an opportunity to seek SPB review.

In contrast, State agencies do not have to give SPB prior notice of their intention to enter into exceptions contracts executed under Government Code § 19130(b). Even though there is no legal obligation imposed upon State agencies to give SPB prior notice of Government Code § 19130(b) contracts, if an employee organization discovers that a State agency has entered into such a contract, the employee organization may ask SPB to review it under Government Code § 19132 and Public Contract Code § 10337(c).

As CSEA correctly states, unlike Government Code § 19131 which provides that an employee organization must request review of a Government Code § 19130(a) contract within 10 days after receiving notice from SPB, there are no time limits in Government Code § 19132 that specify by when an employee organization must ask SPB to review a Government Code § 19130(b) contract. CSEA asserts that, because there are no time limits set forth in Government Code § 19132 for requesting review of Government Code § (b) contracts, an employee organization may request review of such contracts at any time, even after the contracts have expired. CSEA supports its assertion by noting that, even if employee organizations request SPB review of Government Code § 19130(b) contracts before they expire, oftentimes, by the time the SPB review and appeal process is completed, the challenged contracts have expired.

In order to determine whether SPB should review the expired Contracts in this case, the intent of the Legislature when it included the term "executed" in Government Code § 19132 must be determined. We have not found any legislative history that would help us with this inquiry. We must, therefore, ascertain the intent of the Legislature from all the circumstances surrounding the statute's enactment to effectuate the purpose of the law.

The purpose of the law is to ensure that the State utilizes State civil service employees to perform the State's work if State employees can do so adequately and competently.[3] In order to best effectuate the purpose of the law, it appears that Government Code § 19132 should be interpreted to apply only to those contracts that have a current impact on the conduct of the State's on-going workload. Therefore, I find that the term "executed" as it is used in Government Code § 19132 should be interpreted to mean a contract that has been entered into but has not yet expired as of the date the employee organization requests SPB review. While I recognize that contracts that are current at the time SPB's review is requested may expire before that review is completed, such contracts are very different from contracts that have already expired before SPB review is requested. As DHS points out, if a State agency is given notice that an existing contract is being challenged, the agency can take action to address and mitigate any liability that may accrue by terminating the contract and redirecting the work to civil service employees or negotiating with the union for a solution that is acceptable to both parties. If the contract has already expired, the State agency has no opportunity to mitigate any potential liability it may have.

If CSEA's position were adopted and SPB were required to review expired contracts, in addition to proposed and existing contracts, both SPB and State agencies would be saddled with an unlimited burden; employee organizations could reach back indefinitely in time and invoke SPB's review of contracts that no longer have any current impact upon the performance of the State's on-going work. In this time of budget crisis and employee layoffs, SPB does not have the staff or the resources to review contracts that have already expired.

While we understand that the fact that Government Code § 19132 does not require prior notice to either SPB or affected employee organizations before a Government Code § 19130(b) contract may be executed may make it difficult for employee organizations to discover and challenge a Government Code § 19130(b) contract

---

[3] See, Professional Engineers In California Government v. Department of Transportation (1997) 15 Cal.4th 543

Employee unions must either seek to change the statute or work with State agencies to obtain from them any prior notice the employee organizations may desire.[4]

I, therefore, find that, SPB does not have the jurisdiction to review for compliance with Government Code § 19130(b) the Contracts, which expired before SPB review was requested.

This letter constitutes my decision in this matter. Either party has the right to appeal this decision to the five-member State Personnel Board (Board) pursuant to SPB Rule 547.66. Any appeal should be filed no later than 30 days following receipt of this letter to be considered by the Board.

Sincerely,

Walter Vaughn
Executive Officer

cc: Timothy E. Ford, Senior Counsel
Department of Health Services
Office of Legal Services MS 0010
P.O. Box 942732
Sacramento, CA 94234-7320

[4] We understand that some employee organizations have negotiated MOU provisions that provide them with prior notice of 19130(b) contracts.

ATTACHMENT "2"

23

ORIGINAL

ANNE M. GIESE, Chief Counsel (State Bar No. 143934)
HARRY J. GIBBONS (State Bar No. 108881)
California State Employees Association
Local 1000, SEIU, AFL-CIO, CLC
1108 O Street, Suite 327
Sacramento, California 95814
Tel.: (916) 326-4208
Fax: (916) 326-4208

Attorneys for Requestor CALIFORNIA STATE EMPLOYEES ASSOCIATION, Local 1000, SEIU, AFL-CIO, CLC

BEFORE THE STATE PERSONNEL BOARD

FOR THE STATE OF CALIFORNIA

In Re:

DEPARTMENT OF HEALTH SERVICES CONTRACTS WITH HUBBERT CONSULTING, INC. AND IBM CORPORATION

CALIFORNIA STATE EMPLOYEES ASSOCIATION,

Requestor.

_____/

SPB PSC NO. 04-01 and 04-02

CALIFORNIA STATE EMPLOYEES ASSOCIATION'S BRIEF APPEALING EXECUTIVE OFFICER'S DISMISSAL FOR LACK OF JURISDICTION

I.

INTRODUCTION

The Executive Officer has interpreted Government Code section 19132 as establishing a time limit within which unions must challenge personal services contracts. That interpretation ignores the plain meaning of the statutory language.

II.

FACTS

In March 2001, the Department of Health Services ("DHS") executed personal services contracts ("the contracts") with Hubbert Systems Consulting, Inc. ("Hubbert") and the IBM Corporation ("IBM"). DHS executed the contracts pursuant to subdivision (b) of Government Code section 19130, and thus did not notify the State Personnel Board ("the Board") or the interested unions. (*See* Gov. Code, § 19132.)

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

In July 2003, the California State Employees Association ("CSEA") challenged the contracts. By the time CSEA filed its challenge, the contractors had fully performed the work for which they had been hired. (Executive Officer Decision, p. 1.) The Executive Officer concluded that because the contractors had completed their work before CSEA filed its challenge, the Board lacked jurisdiction over the contracts and refused to rule on the merits of the contracts. (Executive Officer Decision, pp. 4-5.)

III.

ARGUMENT

A. The Board has Jurisdiction over the Contracts.

As a general rule, Article VII of the California Constitution prohibits state agencies from contacting out civil service work. (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 550.) Judicial exceptions to the general rule have been codified in Government Code section 19130.[1] (*California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 844.) Subdivision (a) of section 19130 permits contracting when the contract results in "cost-savings" (hereafter "cost-savings" contracts). The procedures for reviewing "cost-savings"contracts are found in section 19131. Subdivision (b) of section 19130 creates a number of other exceptions to the general prohibition against contracting (hereafter "exceptions" contracts). The contracts at issue in this case are "exceptions" contracts. The procedures for reviewing "exceptions" contracts are found in section 19132. Those procedures state that the Board must review the "adequacy of any proposed or *executed* contract" when asked to do so by a labor union. (§ 19132 (emphasis added).)

1. The Term "Executed Contract" is Clear and Unambiguous.

The Executive Officer concludes that once the contractors completed their work, the contracts became "expired" contracts, a term not found in the statutes. If the contracts are "expired," the Executive Officer reasons then they cannot also be "executed" contracts and are thus beyond the Board's jurisdiction. (Executive Officer Decision, pp. 4-5.) The Executive Officer's interpretation of the term "executed contract" is not supported by existing law.

[1]All references are to Government Code sections 19130 through 19132, unless otherwise noted.

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

To the contrary, it is well-established that "[a]n executed contract is one, the object of which is fully performed." (Civ. Code, § 1661; *see also*, 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 8, p. 44.) Although a contract may *arise* once the contractor *begins* work, the contract is not "executed" until it is "fully performed on both sides." (*In Re Marriage of Smith* (1982) 135 Cal.App.3d 556, 559, *citing* Civ. Code, § 1661.) This definition of "executed contract" was codified in 1874 and has remained unchanged since that date. (Civ. Code, § 1661, West's Ann. Codes (1985).)

When the Legislature enacts a statute, it must be assumed that the Legislature had existing law in mind when it did so. (*Schmidt v. Southern California Rapid Transit District* (1993) 14 Cal.App.4th 23, 27.) Thus, when the Legislature enacted section 19132 in 1982, (*see* § 19132 (West's Ann. Code 1995)), the Legislature was well aware that the term "executed contract" meant a contract "which is fully performed." (Civ. Code, § 1661.) Accordingly, although the contracts were fully-performed by the time they were challenged, they nonetheless were and continue to be "executed contracts." (Civ. Code, §1661.) Because they are "executed contracts," section 19132 requires the Board to determine whether the contracts comply with section 19130.

2. A Time Limit for Challenging "Exceptions" Contracts may not be Implied Where None Exists.

The Executive Officer concedes, as he must, that the Legislature did not set an express time limit for challenging "exceptions" contracts. (Executive Officer Decision, p. 3.) Concerned that this lack of a time limit might saddle the Board with an unintended "burden," the Executive Officer relies on legislative intent to imply a *variable* time limit, i.e., a time limit that varies from one contract to the next.[2] The statutory language forecloses any *implied* time limit.

It should first be noted that the Legislature routinely enacts statutes of limitations and similar time limits. (*See e.g.,* Code Civ. Proc., § 340 (one year for personal injury); Code Civ.

[2]The Executive Officer says a contract must be challenged before it "expires," a word not found in any statute. (Executive Officer Decision, p. 4.) Under this rule, time limits will *vary* because some contracts "expire" within a few months, while others extend over many years. Adding to the variability, a contract arguably will "expire" on the "termination" date listed in the written agreement. But the contract could also "expire" on the day the work is completed - which could be earlier than the "expiration date" in the contract. Then again, the contract arguably could "expire" when the last payment is made.

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

Proc., § 1094.6 (90 days to challenge local agency decision); Gov. Code, § 19575 (30 days to file SPB appeal); Gov. Code, § 19630 (one year/90 days to challenge SPB decision).) In this case, the Legislature divided the large category of "personal services contracts" into two smaller categories. (Gov. Code § 19130, subds. (a) and (b).) It then created a different set of review procedures for each category; one set of review procedures includes a time limit for filing contract challenges (Gov. Code, § 19131), while the second set does *not* include any time limit. (Gov. Code, § 19132.) The Legislature does not indulge in idle acts. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 216.) Thus, the lack of a time limit in the second set of procedures was not an oversight or mistake. Rather, the Legislature simply decided to include a time limit for one category of contracts, but not the other.

Similarly, where a statute, with reference to one subject, contains a given provision the omission of that provision from a similar statute concerning a related subject is significant to show a *different* legislative intent. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596.) In this case, two closely related statutes establish procedures for reviewing similar, but slightly different categories of "proposed or executed" contracts. The first statute includes a time limit for challenging a contract (§ 19131), while the second statute does not. (§ 19132.) Despite these obvious differences, the Executive Officer erroneously attributes the *same* legislative intent to both statutes - the intent to create time limits. Again, had the Legislature intended to include a time limit in section 19132, it would have used the same or similar language as it used in section 19131. It did not do so. Thus, under these circumstances, an intent to create a time limit may not be implied. (*Cumero, supra,* 49 Cal.3d at p. 596.)

3. The Legislature Carefully Balanced the Equities When it Created a Time Limit for one Category of Contracts, but not the Other.

As discussed above, section 1932 does not contain a time limit for challenging "exceptions" contracts, nor can one be implied. Thus no additional authority is needed to establish Board jurisdiction over so-called "expired" or fully-performed contracts. Although no additional authority is needed, it should nonetheless be noted that the Legislature carefully balanced the equities when it created a time limit for "cost-savings," but *not* for "exceptions," contracts. This

balance is readily apparent when the two sets of challenge procedures are compared.

With a "cost-savings" contract, the state agency must notify the Board of its intent to execute the contract and it must "provide [the Board] all data and other information relevant to the contracts." (§ 19131.) That data must affirmatively show that the contract meets *all* 13 of the highly technical requirements listed in section 19130, subdivision (a). The data must be convincing because the Board notifies the interested labor unions, which in turn have ten days to challenge the contract. (§ 19131.) Thus the "cost-savings" procedures involve time-consuming preparation and - considering the notice to the unions - a substantial likelihood that the contract will be challenged. These obstacles must *all* be overcome *before* work begins and money spent. (§ 19131; Pub. Contract Code, § 10337, subd. (d).)

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

An agency can avoid *all* of these obstacles - and begin work immediately - by simply treating the contract as an "exceptions" contract. With such a designation, the agency does not have to marshal "data" justifying the contract, it does not have to notify the Board or the unions, and the contractor can immediately start work. (§ 19132.) Because the unions are not notified, the contract may never be challenged, and the agency has saved itself considerable work. However, in the unlikely event the unions discover and challenge the contract, then the agency only has to meet *one* of the ten requirements listed in section 19130, subdivision (b).[3] Even under the best of circumstances, the Board needs a year to complete its review of an "exceptions" contract. (*See e.g., In the Matter of the Appeal of the State Compensation Insurance Fund* (2003) PSC No. 03-06, etc., pp. 2-3.) During that time, the contractor is performing work and being paid by the agency. If the Board ultimately decides the contract is illegal - and assuming the contract has not already "expired" - the agency *might* terminate the contract, but then again it might not. (*See, State Compensation Insurance Fund v. State Personnel Board*, Sacramento Superior Court No. 04CS00049 (contract continues while agency seek judicial review of unfavorable Board decision).) Throughout this process there is no incentive to stop spending money on an "exceptions" contract

---

[3]If the agency finds it difficult to meet *one* of those requirements, the agency can then demand *retroactive* Boards review for "cost-savings" under section 19131, thus obtaining the benefit of *both* review procedures. (*In the Matter of the Appeal of the California State Employees Association* (Department of Veterans Affairs) (1998) PSC No. 98-04.)

because the agency is not liable for the money. Indeed, the agency's only "liability" is a Board decision saying it should not have entered into the contract.[4]

These differences in the challenge procedures - especially the ability to spend money while the Board is reviewing the contract - give agencies a tremendous incentive to choose the "exceptions" procedures over the "cost-savings" procedures. The choice, however, is not risk-free. The Legislature decided that if an agency chooses the more burdensome, and more publicly scrutinized, "cost-savings" procedures, then the agency would enjoy the protection of a ten-day challenge period. (§ 19131.) If, however, the agency chose the less burdensome - and more secretive - "exceptions" procedures, then the agency's contract could be challenged without reference to a time limit. (§ 19132.)

4. State Agencies Cannot Mitigate Their Liability to the Labor Unions, Because no such Liability Exists.

The Executive Officer implies a time limit for challenging contracts in section 19132 because, in the Executive Officer's view, a time limit will enable a state agency to "mitigate any potential liability it may have" to the labor unions. (Executive Officer Decision, p. 4.) There are several problems with this reasoning.

First, the Executive Officer does not cite an authority, nor has any been found, which imposes a monetary or other significant "liability" on a state agency for entering into an illegal contract. Indeed, the only "liability" an agency incurs is a Board decision confirming that a particular "exceptions" contract is or *was* illegal. Such a decision hardly burdens an agency, although taxpayers may be able to use the decision to recover illegal payments from the contractor. (*See, Miller v. McKinnon* (1942) 20 Cal.2d 83, 89 (contractor liable to taxpayers even though contract has been fully-performed.)

Second, in reaching his conclusion about "liability,"the Executive Officer cites *Professional Engineers v. Dept. of Transportation* (1997) 15 Cal.4th 543, for the proposition that the purpose of the Civil Service Mandate "is to ensure" that the State utilizes "State civil service

---

[4]At most, taxpayers might sue the contractor, but not the state agency, to recover the money for the State's general fund, a difficult task in its own right. (*See Miller v. McKinnon* (1942) 20 Cal. 2d 83, 89.)

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

employees to perform the State's work." (*Ibid.*) Proceeding from that premise, the Executive Officer reasons that once a contract "expires," a state agency is unable to mitigate its liability by "redirect[ing]" the contractor's work to the civil service. If the work cannot be redirected, the Executive Officer continues, the contract no longer has "a current impact" on the State's "on-going workload," and should not, therefore be reviewed by the Board. *Professional Engineers*, however, says nothing about "ensur[ing]" work for civil service employees. Rather, it says the Civil Service Mandate is intended "to eliminate the 'spoil system' of political patronage." (*Professional Engineers,* 15 Cal.4th at 550, 554.) That goal is achieved by preventing state officials - elected or otherwise - from hiring contractors "on the basis of political consideration or cronyism." (*Id,* at p. 564.) Simply stated, the intent of the Civil Service Mandate is to prevent state officials from channeling public funds to their cronies. Accordingly, when the Board reviews contracts, the Board is not seeking to "ensure" work for the civil service, although that may be a by-product. Rather, the Board is seeking to determine whether public money is being spent on illegal contracts. If money has been spent on illegal contracts, the Board needs to make that determination so that taxpayers may at least try to recover the illegal expenditures.

Third, by linking the Board's jurisdiction to an agency's ability to "redirect" the work in a timely manner, the Executive Officer calls into question the Board's jurisdiction over contracts that are challenged *before* their respective "expiration" dates. For instance, state agencies usually need several months - at the minimum - to hire new employees. Accordingly, if a contract is challenged near the end of its term, an agency can argue it lacks sufficient time to "redirect" the work, thus avoiding the Board review.

5. The Board Should not Read an Implied "Time Limit" into Section 19132 for the Same Reason it Would Not Read an Implied "Notice" Requirement into Section 19132.

Assuming for the sake of argument that state agencies incur some "liability" for illegal contracts, then the *earlier* a union has an opportunity to challenge a contract, the earlier the agency can mitigate its liability by "redirect[ing]" the work. The Board could ensure that unions challenge "exceptions" contracts at the earliest possible time simply by finding an *implied* "notice" requirement in section 19132, similar to the one on in section 19131. Such a "notice" requirement

would allow agencies to "redirect" the work *before* the contractor started performing, therby eliminating *any* agency liability. Of course, there is a difficulty with implying a "notice" requirement in section 19132: the Legislature - as evidenced by section 19131 - had the opportunity to include a "notice" requirement in section 19132, but decided not to do so. Thus, no such requirement can not be implied, even though they might help agencies reduce their "liability." Similarly, however, the Legislature - again as evidenced by section 19131 - had the opportunity to include a "time limit" for filing challenges in section 19132, but decided not to do so. Accordingly, just as the Board cannot read a "notice" requirement into section 19132, it also cannot read a "time limit" into the same section, even though such an implied "time limit" might help agencies reduce their "liability."

IV.

CONCLUSION

The Board has jurisdiction over the contracts and must therefore determine whether the contracts comply with subdivision (b) of section 19130.

DATED: February 10, 2004

Respectfully submitted,

CALIFORNIA STATE EMPLOYEES ASSOCIATION
SEIU Local 1000, AFL-CIO, CLC

By: _____
HARRY J. GIBBONS
Attorneys for CALIFORNIA STATE EMPLOYEES ASSOCIATION

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

I:\Sacramento\gibbons\Contracting Out\DHS-IT.Hubbert\Pleadings\Board Brief2d.wpd

DECLARATION OF SERVICE

CASE NAME: California Department of Health Services Contract for Information Technology Services (Contract No. 3-98-70-0693A) with Hubbert Systems Consulting, Inc. and with IBM Corporation (Contract No. 3094-70-0032)
COURT: State Personnel Board
CASE NO.: PSC NO. 04-01 and 04-02

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1108 "O" Street, Sacramento, California 95814.

I am familiar with California State Employees Association's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a United States mailbox after the close of each day's business.

On February 10, 2004, I served the following:

CALIFORNIA STATE EMPLOYEES ASSOCIATION'S BRIEF APPEALING EXECUTIVE OFFICER'S DISMISSAL FOR LACK OF JURISDICTION

[X] (BY MAIL) placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Sacramento, California, addressed as follows:

GREG SMITH
Department of Health Services
Information Technology Services Dept.
744 P Street, Room 360
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on February 10, 2004 at Sacramento, California.

MARY A. MEDINA

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

ATTACHMENT "3"

Timothy E. Ford
Senior Counsel
Office of Legal Services
Department of Health Services
1501 Capitol Avenue, Suite 71.5001, MS 0010
P.O. Box 997413
Sacramento, California 95899-7413
Telephone: (916) 440-7822
Fax; (916) 440-7708

Attorney for the State Department of Health Services

BEFORE THE STATE PERSONNEL BOARD

FOR THE STATE OF CALIFORNIA

In Re: **DEPARTMENT OF HEALTH SERVICES CONTRACTS WITH HUBBERT CONSULTING, INC. AND IBM CORPORATION** **CALIFORNIA STATE EMPLOYEES ASSOCIATION,** Requestor,	**SPB PSC NO. 04-01 and 04-02** **OPPOSITION TO CALIFORNIA STATE EMPLOYEES ASSOCIATION'S BRIEF APPEALING EXECUTIVE OFFICER'S DISMISSAL FOR LACK OF JURISDICTION**

INTRODUCTION

This case involves a strict legal question, whether the State Personnel Board (SPB) has the jurisdiction to review personal services contracts that have expired before an employee first gives notice to the SPB of its intent to challenge such a contract. The background of this case has been well described in the Executive Officer Decision which is being appealed (dated November 20, 2003), and the previous letters of the parties, and there is no need for a substantial recitation of that material.

Likewise, factual background statements contained in the brief filed by the California State Employees Association (CSEA) in this case, dated February 11, 2004, will not be repeated here.

However, the Department of Health Services (DHS) believes it is relevant to discuss certain portions of the CSEA Brief, which DHS believes inaccurately states portions of the SPB decision letter at issue in this appeal. CSEA's Brief (at page 2) describes a portion of the SPB decision letter as follows:

> "By the time CSEA filed its challenge, the contractors had fully performed the work for which they had been hired. (Executive Officer Decision, p. 1.) The Executive Officer concluded that because the contractors had completed their work before CSEA filed its challenge, the Board lacked jurisdiction over the contracts and refused to rule on the merits of the contracts. (Executive Officer Decision, pp. 4-5.)"

However, the SPB decision letter did not contain statements such as "had fully performed the work" or "the contractors had completed their work." Instead, the decision letter frequently and consistently uses the term "expired" when referring to the agreements raised by CSEA.

The CSEA Brief also represents the SPB decision letter as follows: "If the contracts are 'expired,' the Executive Officer reasons then they cannot also be 'executed' contracts and are thus beyond the Board's jurisdiction." However, nowhere in the SPB decision letter does it state or even remotely imply the characterization made by CSEA. Obviously, every contract that has now expired, at one point was "executed," and prior to that point in time was "proposed," the terms contained in Government Code section 19132.

CSEA's erroneous reading of the SPB decision letter instead conveniently supports its argument that, stripped to its essence, declares that an ancient and archaic provision of an entirely different code of California statutes must govern the interpretation of modern statutes, all of which are contained in entirely different codes.

///

///

1. The Interpretation Urged by CSEA of the Term "Expired" is Clearly Erroneous and Should Be Rejected

CSEA argues that California Civil Code section 1661, a statute that was passed 130 years ago, and not amended since, should be used to define an "executed" contract, as the term is used in the statutes at issue (Gov. Code, § 19132; Pub. Contract Code, § 10337.)

However, it is clear that in the State government context, the term "executed" has long since become synonymous with that stage in the formation of a contract when the agreement has simply been approved and is in effect.

A brief review of well-accepted principles of statutory interpretation is in order. As well expressed in Cousins v. Weaverville Elementary School (1994), 24 Cal.App.4th at 1846, 1853-54:

" ... [A]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." [Citations omitted.] "Moreover, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. [Citation."] ... "Applying the general rules of statutory construction, to the extent there is any ambiguity in the language of the statute here in question, we must endeavor to ascertain and effectuate the purpose of the law, attempting to give effect to the usual and ordinary import of the statutory language; harmonizing any provisions within the context of the statutory framework as a whole; seeking a reasonable and common sense interpretation consistent with the apparent and legislative purpose and intent, practical rather than technical in character and upon application resultant of wise policy rather than absurdity; and, considering generally the context, the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction. [Citations omitted.]" (Cousins, supra, at p.1855.)

///

Lastly, the rule of construction, to use terms in their modern context, is explained in Smedberg v. Bevilockway (1936) 14 Cal.App.2d 312, 316. "In Melvin v. State, 121 Cal. 16, 53 pp. 416, 419, the court considered the meaning of the word 'debt' as used in various statutes and particularly as used in ... the Civil Code. The court then said: 'In all these provisions we think it plain that the construction to be put on the statute is ... to be used in its modern legal significance .... '"

In this case, the statutes at issue are in the Government Code (created in 1943) and Public Contract Code (created in 1981). A search of those codes reveals that the term "executed," when used to refer to a contract or agreement, appears in 28 sections of the Public Contract Code, and in 81 sections of the Government Code. A review of those sections shows that the Legislature is consistently using "executed" to refer to a contract or agreement at the stage where it has been signed and approved. In no way is the term used in the archaic terminology of Civil Code section 1661 (fully performed). For a few representative examples of how "executed" is used in the modern context, see Public Contract Code sections 7110, 10184, 10335, and 10784; Government Code sections 6522, 6581, 6585, 11005.2, 20612, 38757, and 70326. The relevant portions of these sections appear in Exhibit A to this brief.

Furthermore, the Legislature has demonstrated that it well knows how to refer to a contract that has been "fully performed", as shown in Government Code sections 6596, 9122, 15449, 63033, 91547, 91559.4, and 92352. All of these sections involve the same basic structure and import, e.g., Government Code section 6596, which provides in relevant part:

> "The State of California does hereby pledge to, and agrees with, the holders of any bonds issued under this article, and with those parties who may enter into contracts with the authority pursuant to this article, that the state will not limit or alter the rights hereby vested in the authority to finance any public capital improvement and to fulfill the terms of any loan

agreement, lease, or other contract with the authority pursuant to this part, or in any way impair the rights or remedies of the bonds or of the parties until those bonds, together with the interest thereon, are fully met and discharged and those contracts are **fully performed** on the part of the authority." [Emphasis added.]

Finally, the premise of CSEA that "executed" means a contract that has been fully performed, would lead to the strange result that the review of exemption-type personal services contracts would involve only those which are either "proposed" (not yet in effect), or those which have been "fully performed." The CSEA premise thus would result in an absurd situation whereby contracts could only be reviewed if they have simply been proposed, but if not then, only after they have been fully performed.

Such strained interpretations, leading to such strange results, are counter to the accepted rules of statutory construction, and thus should be rejected, in favor of the common sense and harmonious interpretation contained in the SPB decision letter. After all, as the government agency charged with administration of this statutory scheme, SPB's interpretation is to be given great weight, and its well-reasoned interpretation is to be given great deference unless clearly erroneous. "Administrative interpretation of a statute by the agency charged with its enforcement is entitled to great weight unless shown to be clearly erroneous or unauthorized." (American Hospital Supply Corporation v. State Board of Equalization (1985), 169 Cal.App.3d 1088, at 1092.) "When statutes require a particular class of controversies to be submitted first to an administrative agency as a prerequisite to judicial consideration, and the parties reasonably dispute whether their case falls into that category, it lies within the agency's power 'to determine in the first instance, and before judicial relief may be obtained, whether [the] controversy falls within the [agency's] statutory grant of jurisdiction [citations].'" (Styne v. Stevens (2001), 26 Cal.4th 42, at 56). And, "... the Commissioner, whose interpretation of a statute he is charged with enforcing deserves substantial weight (Styne, supra, at 53)."

2. Cost-Saving Contracts are Significantly Different from Exception Contracts, Making It Inappropriate to Compare the Two Schemes for the Purposes Urged by CSEA

CSEA takes the position that SPB should interpret Section 19130(b) in light of close parallels with Section 19130(a). CSEA comes to this approach by observing, "In this case, two closely related statutes establish procedures for reviewing similar, but slightly different categories of 'proposed or executed' contracts." (CSEA Brief, page 4.)

However, the SPB decision letter certainly does not adopt such a viewpoint. Instead, it says, "As CSEA explains in its submissions, the procedures for reviewing cost-savings contracts executed under Government Code § 19130(a) are very different from those for reviewing exceptions contracts executed under Government Code § 19130(b)." (SPB decision letter, page 3.)

CSEA goes on to suggest that the processes applicable to cost-saving and exception contracts are so similar in scope and purpose, that one could conclude that a state agency can merely choose which contract review process it wants to follow. Of course, as the SPB decision makes clear, the two processes are not at all alike, involve completely different premises and criteria, and SPB is correct in not drawing the analogies urged by CSEA.

3. Laches

The equitable doctrine of laches also applies generally, and thus should bar an action challenging personal services agreements after the agreements have expired.

"'The defense of Laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.'" (Johnson v. City of Loma Linda, (2000) 24 Cal.4th 61, at 68; citation omitted.)

The maxim "Equity aids the vigilant" (Civ. Code, § 3527) is applicable in the doctrine of laches. Those who neglect their rights may be precluded from obtaining relief in equity. (11 Witkin, Summary 9th, Chapter XVIII, Equity, C.6.(a); citations omitted.) To constitute laches, the delay need not necessarily be lengthy (Corpus Juris Secundum,

Equity, § 129; citations omitted). The delay must be such that to uphold the plaintiff's claim would permit an unwarranted injustice (30 Cal.Jur. 3d Equity IV B; citations omitted).

We cannot think how CSEA could have any reasonable excuse for not pursuing these actions in a more timely manner. In this case, DHS had no notice of CSEA's intention to challenge such contracts until after the agreements had expired, resulting in unreasonable prejudice to DHS; the maximum amount of damage to DHS would have already accrued.

CSEA argues that "State Agencies Cannot Mitigate Their Liability to the Labor Unions, Because No Such Liability Exists." (CSEA Brief, page 6.) CSEA raises this argument based upon what appears to be a mistaken reading of the SPB decision letter. CSEA's Brief states that "The Executive Officer implies a time limit for challenging contracts in section 19132 because, in the Executive Officer's view, a time limit will enable a state agency to 'mitigate any potential liability it may have' **to the labor unions** [emphasis added]. (Executive Officer Decision, p. 4.)" (CSEA Brief, page 6.)

However, the SPB decision letter does not include the phrase "to the labor unions." The SPB decision letter understands the DHS premise. It is prejudice and harm to DHS that is relevant, not whether DHS may or may not have any direct "liability" to CSEA.

CONCLUSION

For the reasons stated herein, the ruling made by the SPB Executive Officer in his decision letter of November 20, 2003, should be adopted by the State Personnel Board.

Respectfully submitted,

DEPARTMENT OF HEALTH SERVICES

DATED: March 11, 2004

TIMOTHY E. FORD
Senior Counsel

PROOF OF SERVICE

In the Matter before the State Personnel Board in re: Department of Health Services Contracts with Hubbert Consulting, Inc. and IBM Corporation v. California State Employees Association

I am employed in the County of Sacramento, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 1501 Capitol Avenue, Suite 71.5001, MS 0010, P.O. Box 997413, Sacramento, CA 95899-7413

I served document described as:

DHS' Opposition to California State Employees Association's Brief Appealing Executive Officer's Dismissal for Lack of Jurisdiction

on the following parties and addresses:

Harry J. Gibbons, Esq.
California State Employees Association
Local 1000, SEIU, AFL-CIO, CLC
1108 O Street, Suite 327
Sacramento, CA 95814

Karen Brandt
Senior Staff Counsel
State Personnel Board
801 Capitol Mall, MS-53
Sacramento, CA 95814

by:

[_X_]BY MAIL on March 12, 2004: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2004, at Sacramento, California, by

Lynne Chinn
Declarant

ATTACHMENT "4"

ORIGINAL

ANNE M. GIESE, Chief Counsel (State Bar No. 143934)
HARRY J. GIBBONS (State Bar No. 108881)
California State Employees Association
SEIU, Local 1000, AFL-CIO, CLC
1108 O Street, Suite 327
Sacramento, California 95814
Tel.: (916) 326-4208
Fax: (916) 326-4208

Attorneys for Requestor CALIFORNIA STATE EMPLOYEES ASSOCIATION, Local 1000, SEIU, AFL-CIO, CLC

BEFORE THE STATE PERSONNEL BOARD

FOR THE STATE OF CALIFORNIA

In Re:

DEPARTMENT OF HEALTH SERVICES CONTRACTS WITH HUBBERT CONSULTING, INC. AND IBM CORPORATION

CALIFORNIA STATE EMPLOYEES ASSOCIATION,

Requestor.

_____/

SPB PSC NO. 04-01 and 04-02

CALIFORNIA STATE EMPLOYEES ASSOCIATION'S REPLY BRIEF

1. The Essence of CSEA's Argument is that an Administrative Agency Cannot Imply a Statutory Time Limit When the Legislature has not Imposed One.

DHS argues that, "stripped of its essence," CSEA's contention that the Board has jurisdiction is premised on an ancient and archaic provision of law, namely Civil Code section 1661. (DHS Brief, 2:22-25.) First, Civil Code section 1661 is hardly archaic as courts have relied on it as recently as 1982. (*In Re Marriage of Smith* (1982) 135 Cal.App.3d 556, 559, *citing* Civ. Code, § 1661.) Second, and more to the point, DHS completely misunderstands the essence of CSEA's argument.

The essence of CSEA's argument is this: The Executive Officer is prohibited from *implying* a statutory time limit because - in this case - the Legislature has expressly declined to impose one. Specifically, the Legislature split the large category of personal services contract into

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

two smaller categories: "cost-savings contracts" (Gov. Code, § 19130, subd. (a))[1] and "exceptions contracts." (§ 19130, subd. (b).) The Legislature then created different review procedures for the two categories. For "cost-savings contracts," the Legislature imposed (1) a *notice* requirement on state agencies and (2) a *time limit* within which unions must file a contract challenge. (§ 19131.) The Legislature, on the other hand, did not impose either of these requirements on "exceptions contracts." Section 19132 does not require state agencies to notify the unions about exceptions contracts, nor does it impose a time limit within which unions must challenge such contracts. (§ 19132.) It is settled law that administrative agencies, including this Board, have only such powers as have been conferred on them by constitution or statute and they may not act in excess of those powers. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-04.) Given the statutory scheme in this case, it clearly would be improper for the Executive Officer to construe section 19132 as imposing an *implied* notice requirement on state agencies. Similarly - and this is the essence of CSEA's argument - it is improper for the Executive Officer to construe section 19132 as imposing an *implied* time limit on the unions.

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

2. If the Board is to Adopt an Implied Time Limit, it Should Adopt Section 337(1) of the Code of Civil Procedures.

DHS argues that the term "executed contract" has long been synonymous "with that stage in the formation of the contract when the agreement has simply been approved and is in effect." (DHS Brief, 3:7-9.) Stated more succinctly, DHS appears to contend that a contract becomes an "executed contract" when it is approved or signed by the parties; it then ceases to be an "executed contract" when it is no longer "in effect." Presumably, DHS contends that a contract ceases to be "in effect" once the contractor has completed work and received the final payment. DHS cites eleven Government Code sections in support of its definition of "executed contract." (DHS Brief, 4:180-21.) None of those sections, however, contain such a definition.

For instance, section 38757 simply states: "The contract or deed shall be executed on behalf of the city by the mayor," while section 20612 says that "an amendment to the contract shall

[1]All references are to the Government Code unless otherwise noted.

take effect the first day of the fiscal year next succeeding that in which the contract is executed." At most, these statutes suggest that a contract becomes an "executed contract" when it is signed or approved by the parties. The statutes, however, say nothing about how long an "executed contract" remains "in effect."

As a practical matter, a contract necessarily remains "in effect" until an action based on the contract is barred by a statutory time limit. For instance, assume that a contract has been "executed on behalf of the city by the mayor" (§ 38757), the contractor has completed the work, and the city has made its final payment. The city nonetheless still has *four* years from the date of the last payment to sue the contractor for shoddy work, misrepresentation, or other causes. (Code Civ. Proc., § 337(1).) Thus, if DHS is correct in asserting that a contract becomes an "executed contract" when signed by the parties, that contract nonetheless remains "in effect" for up to four years *after* the final payment has been received. Stated differently, the contract remains "in effect" until the appropriate statutory time limit prevents an "action upon [the] contract" from being filed. (Code Civ. Proc., § 337(1).)

As previously noted, the Legislature has not imposed a statutory time limit for "exceptions contracts" and thus the Board should not imply one. (*Ferdig, supra,* 71 Cal.2d at 103-04.) However, to the extent that the Board may imply a time limit, it should look for guidance in the widely used - and thus more appropriate - time limit established by Section 337(1) of the Code of Civil Procedure. By adopting that section as the governing time limit, the Board will place state contractors in the position shared by most other contractors. Specifically, their contracts, like the contracts of others, may be challenged for up to four years after the final payment has been received.

3. The Equitable Doctrine of Laches Does Not Apply.

DHS claims that CSEA's contract challenge is barred by the equitable doctrine of laches. (DHS Brief, 6:19-23.) Laches is a *defense* to a cause of action and thus the burden of proof rests with DHS. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 360, fn. 10 (citations omitted).) DHS must therefore *prove* (1) that CSEA unreasonably delayed in

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

challenging the contract and (2) that DHS suffered prejudice. (*Johnson v. City Loma Linda* (2000) 24 Cal.4th 61, 68, citing *Conti, supra,* 1 Cal.3d at 359.)

Delay usually is measured from the date a party receives notice of an adverse decision. (*See, Conti, supra,* 1 Cal.3d at 359 (laches does not apply where party scheduled a judicial hearing within 10 months of receiving adverse notice); *Johnson, supra,* 24 Cal.4th at 66-67 (laches does apply where party did not schedule a judicial hearing until three years after receiving adverse notice).) In this case, DHS did not notify CSEA that DHS was proposing contracts adverse to CSEA's interest. Nor did anyone else notify CSEA. Thus, delay cannot be measured from the date of notice, because there was no notice. Delay arguably can be measured from the date CSEA first discovered the contracts through its own devices. The record suggests that CSEA immediately acted once it discovered the contracts. (*See*, Declaration of Melinda L. Williams, dated July 17, 2003.) However, if it is assumed for the sake of argument that the record is unclear as to when CSEA discovered the contracts, the burden nonetheless remains with DHS to prove that not only did CSEA delay once CSEA discovered the contracts, but that the delay was unreasonable. (*Conti, supra*, at 1 Cal.3d at 359.) DHS has not introduced any evidence as to when the contracts were discovered, and thus it has failed to prove unreasonable delay.

Further, even if DHS carried its burden on unreasonable delay - which it has not - it has failed to introduce evidence on the most important element: prejudice. DHS broadly claims that it has suffered "prejudice and harm" (DHS Brief 7:17-18), but it fails to describe that "prejudice and harm." It is also hard to imagine what that "prejudice and harm" might be. After all, DHS is not monetarily liable to CSEA, to the tax payers, or to anyone else for executing an illegal contract. The Executive Officer suggests that DHS has suffered harm in that the lack of a time limit prevented DHS from "mitigat[ing] any liability that might accrue." (Executive Officer's Decision, p. 4.) However, neither the Executive Officer nor DHS has explained for what, or to whom, DHS might be liable. Absent some potential liability - and none has been shown - the doctrine of laches does not apply.

///

///

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

4. Conclusion.

The Board has jurisdiction over the contract and must determine whether the contracts fall within one of the exceptions listed in Government Code section 19130(b).

DATED: March 19, 2004

Respectfully submitted,

CALIFORNIA STATE EMPLOYEES ASSOCIATION
SEIU Local 1000, AFL-CIO, CLC

By: _____
HARRY J. GIBBONS
Attorneys for CALIFORNIA STATE EMPLOYEES ASSOCIATION

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

I:\Sacramento\gibbons\Contracting Out\DHS-IT.Hubbert\Pleadings\Reply.Brief.wpd

DECLARATION OF SERVICE

CASE NAME: California Department of Health Services Contract for Information Technology Services (Contract No. 3-98-70-0693A) with Hubbert Systems Consulting, Inc. and with IBM Corporation (Contract No. 3094-70-0032)
COURT: State Personnel Board
CASE NO.: PSC NO. 04-01 and 04-02

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1108 "O" Street, Sacramento, California 95814.

I am familiar with California State Employees Association's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a United States mailbox after the close of each day's business.

On March 19, 2004, I served the following:

CALIFORNIA STATE EMPLOYEES ASSOCIATION'S REPLY BRIEF

[X] (BY MAIL) placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Sacramento, California, addressed as follows:

TIMOTHY E. FORD, Senior Counsel
Department of Health Services
Office of Legal Services MS 0010
P.O. Box 942732
Sacramento, CA 94234-7320

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on March 19, 2004 at Sacramento, California.

MARY A. MEDINA

CALIFORNIA STATE EMPLOYEES ASSOCIATION
1108 "O" Street
Sacramento, California 95814
Telephone: (916) 326-4208

Cal. 5-4/5-04

TO: STATE PERSONNEL BOARD

FROM: DAPHNE BALDWIN, Manager, Policy Division
CAROL ONG, Manager, Policy Development

REVIEWED BY: JOAN ALLISON, Acting Chief
Policy Division

SUBJECT: PROPOSAL TO ABOLISH THE DEPUTY INSPECTOR GENERAL; DEPUTY INSPECTOR GENERAL, SENIOR; AND DEPUTY INSPECTOR GENERAL, IN-CHARGE ELIGIBLE LISTS; AND TO VOID APPOINTMENTS MADE FROM THE DEPUTY INSPECTOR GENERAL, IN-CHARGE ELIGIBLE LIST

REASON FOR HEARING

SPB staff is recommending that three eligible lists created from promotional examinations given by the Office of the Inspector General (OIG) be abolished and that two appointments made from one of those lists be voided. This hearing is to allow the Board to hear from OIG, affected employees and interested members of the public before reaching a final decision on staff's recommendation.

BACKGROUND

In July 2003, OIG was notified that its budget was scheduled to be reduced by approximately 70% and that a large number of OIG employees, the vast majority of whom were in Deputy Inspector General (DIG) classifications, would be subject to lay-off if they did not first obtain employment with other state agencies.

Most of OIG's employees in the DIG classifications had transfer appointments, and not list, appointments, in order to enhance those employees' opportunities for further transfer appointments into different classifications in other state agencies, OIG decided to conduct promotional examinations for the following classifications: DIG; DIG, Senior; and DIG, In Charge. In an e-mail to an Associate DIG (ADIG) dated August 11, 2003, OIG's personnel analyst explained the purpose for the examinations as follows:

1. The purpose of these promotional exams is to afford the opportunity to individuals serving an appointment in a class to gain a "list" appointment to the class. Many individuals within our agency were appointed to the class for which they are an incumbent by virtue of a lateral transfer. To gain a list appointment to the class may very well afford these folks the chance for a wider variety of options to move elsewhere.

2. For those of you who are ADIGs, there is no anticipated benefit to compete. The agency is in no position to offer promotions (ADIG to DIG, for example). The purpose of all of this is to let DIGs get list appointments to DIG, DIG, Senior to gain list appointments to DIG, Senior, etc.

OIG conducted the promotional examinations during August 2003. Fifteen OIG employees took the DIG examination, ten of whom already had permanent status in that classification as a result of transfer appointments. Eleven OIG employees took the DIG, Senior examination, three of whom already had permanent status in that classification as a result of transfer appointments. Three OIG employees took the DIG, In-Charge examination, two of whom already had permanent status in that classification as a result of transfer appointments.

In September 2003, after receiving a complaint about the examinations, SPB staff initiated an investigation and froze the eligible lists; thereby, prohibiting OIG from making any further appointments from the lists until after the investigation was completed. Before SPB staff froze the DIG, In-Charge eligible list, OIG had made two appointments from that list.

On December 5, 2003, SPB staff issued a report, finding, among other things, that OIG had administered the promotional examinations not to find well-qualified candidates to fill vacant positions, but, instead, to provide employees already in the tested classifications with list appointments so that they would be better able to obtain future transfers to different classifications in other state agencies, and thereby circumvent Board Rule § 435, which prohibits consecutive transfers.[1] (A copy of the staff report is attached hereto as Attachment 1.)[2]

---

[1] Title 2, California Code of Regulations § 435 provides:

> Consecutive transfers shall not be permitted when their combined result would be inconsistent with the provisions of this article or Government Code Section 19050.4.

The effect of this rule is to prohibit an employee from obtaining multiple transfer appointments where the total result of those transfer appointments would be to grant the employee an appointment to a classification whose maximum salary range is two or more steps higher than the maximum salary range of the employee's last list appointment. In other words, the rule prohibits consecutive transfers when the net result is to allow an employee to transfer into a promotional position without having taken a promotional examination.

[2] In 2002, when OIG was about to close its Rancho Cucamonga office, OIG administered a DIG examination. In August 2002, OIG granted list appointments to eight DIGs on the eligible list who had transfer appointments. In March 2003, SPB staff was informed of those list appointments by the State Controller's Office. When SPB inquired about those appointments, OIG stated that they "were made in order to enhance/broaden the individuals' potential for lateral transfers. The decision to provide list appointments was made in light of departmental layoffs and is not precluded by applicable law and/or rule." SPB staff took no action to void those appointments.

APPLICABLE LAW

Article VII, Section 1, subdivision (b) of the California Constitution provides:

> In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Government Code § 18900, subdivision (a) provides:

> Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule.

Government Code § 18935, in relevant part, provides:

> The board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:
>
> ...(b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies.

Government Code § 19257.5 provides:

> Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning if such action is taken within one year after the appointment.

ISSUES

The following issues are before the Board for review:

1. Should the Board exercise its authority under Government Code § 18935, subdivision (b) to abolish the eligible lists created from the OIG examinations?

2. Should the Board exercise its authority under Government Code § 19257.5 to void the two list appointments made from DIG, In-Charge eligible list?

SUMMARY OF SPB STAFF'S POSITION

SPB staff recommends that the eligible lists be abolished and the appointments made from one of those lists be voided for the following reasons:

Article VII, Section 1, subdivision (b) of the California Constitution mandates that appointments in the civil service be based upon merit ascertained by competitive examination. Government Code § 18900, subdivision (a) provides that eligible lists shall be established as a result of free competitive examinations. The merit principle and Government Code § 18900 mandate that appointing powers must refrain from making any pre-determinations as to who they will or will not select for appointment or promotion until after a fair and equitable examination process has been conducted.

Government Code § 18935, subdivision (b) authorizes the Board to refuse to certify appointments from an eligible list when it determines that an examination was administered solely for the purpose of providing pre-selected transferees with list appointments in their current positions and not as a valid testing device to select meritorious candidates for promotion to vacant positions.

Because OIG administered the DIG, DIG, Senior and DIG, In-Charge examinations for the sole purpose of granting list appointments to incumbent transferees in order to enhance their ability to transfer further to new classifications in other state agencies without having to take competitive examinations for those new classifications, the examinations violated the merit principle. The Board should exercise its authority under Government Code § 18935, subdivision (b) and abolish the eligible lists. In addition, the Board should exercise its authority under Government Code § 19257.5 and void the appointments made from the DIG, In-Charge list.

By abolishing the lists and voiding the illegal appointments, the Board will not adversely impact any employees' ability to seek further legal transfers from their last list appointments or to take examinations to obtain legal promotional appointments.

SUMMARY OF OIG'S RESPONSE

On December 29, 2003, OIG submitted its Response to staff's investigative report. (A copy of OIG's Response is attached hereto as Attachment 2.)

In its Response, OIG argues that the Board should not exercise its authority under Government Code § 18935, subdivision (b) for the following reasons:

(1) In 2000, after OIG's mandate was significantly expanded by the Legislature, OIG had an urgent need to fill 110 positions. Blending audit and

investigative duties into a single classification created the DIG classification. Given its urgent need to hire a significant number of employees into a newly created classification where few met the minimum qualifications, OIG decided to fill most DIG positions through transfer, rather than list appointment. The incumbent employees on the list have satisfactorily performed their duties in their classifications for several years. In light of these unique circumstances, the Board should refrain from exercising it authority under Government Code § 18935, subdivision (b).

(2) Incumbent employees were not given sufficient notice of SPB's "last list appointment" policy, which prevents them from obtaining consecutive transfers that would result in a salary that is 10% or more greater than the salary of their last list appointment.

(3) Authorizing the list appointments and subsequent transfers of the employees in this case is no more violative of the state's merit principles that other transfer practices routinely permitted by SPB.

OIG requests that SPB certify the eligible lists generated from the disputed examinations. In the alternative, OIG requests that the Board approve the transfers of those employees whose transfers would violate SPB's consecutive transfer rule.

SPB STAFF RECOMMENDATION

SPB staff recommends that the Board adopt the following resolution abolishing the eligible lists and voiding the two appointments made from those lists:

WHEREAS, Article VII, Section 1, subdivision (b) of the California Constitution provides, "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination"; and

WHEREAS, Government Code § 18900, subdivision (a) provides, "Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule"; and

WHEREAS, Government Code § 18935, in relevant part, provides, "The board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories: ...(b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies"; and

WHEREAS, Government Code § 19257.5 states, "When the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning if such action is taken within one year after the appointment"; and

WHEREAS, in or about August 2003, the Office of the Inspector General (OIG) administered promotional examinations for the classifications of Deputy Inspector General, Deputy Inspector General, Senior and Deputy Inspector General, In-Charge and established the following eligible lists:

- Deputy Inspector General effective September 11, 2003
- Deputy Inspector General, Senior effective September 11, 2003
- Deputy Inspector General, In-Charge effective August 21, 2003

WHEREAS, OIG administered the examinations and established the eligible lists for the sole purpose of providing pre-selected transferees with list appointments in their current positions, and not as valid testing devices to select meritorious candidates for promotion to vacant positions; and

WHEREAS, OIG's purpose in conducting the promotional examinations and establishing the eligible lists was contrary to the merit principle embodied in Article VII, Section 1, subdivision (b) of the California Constitution and the provisions of Government Code § 18900 subdivision (a);

WHEREAS, in light of the foregoing, the Board has decided to exercise its authority under Government Code § 18935, subdivision (b) to withhold and withdraw from certification the names of all employees on the eligible lists who, at the time of examination, had permanent status in the classifications for which they applied, and to abolish the eligible lists;

WHEREAS, the Board has also decided to exercise its authority under Government Code § 19257.5 to void all appointments that may have been made from the eligible lists;

THEREFORE, BE IT RESOLVED AND ORDERED, that:

(1) Pursuant to Government Code § 18935, subdivision (b), the Board hereby withholds and withdraws from certification the names of all employees on the eligible lists for Deputy Inspector General, Deputy Inspector General, Senior, and Deputy Inspector General, In-Charge, who, at the time of examination, had permanent status in the classifications for which they applied, and abolishes those lists.

(2) Pursuant to Government Code § 19257.5, the Board hereby voids the list appointments of the two Deputy Inspector General, In-Charge that were made from the Deputy Inspector General, In-Charge eligible list that has been abolished.

(3) The Board's actions in abolishing the eligible lists and voiding the appointments shall not adversely impact the ability of the employees whose names were on the abolished eligible lists to obtain transfer appointments based upon their last list appointments or to take promotional examinations that are administered in accordance with applicable law and rules.

Cal. 5-4/5-04

TO: STATE PERSONNEL BOARD

FROM: DAPHNE BALDWIN, Manager, Policy Division
CAROL ONG, Manager, Policy Development

REVIEWED BY: JOAN ALLISON, Acting Chief
Policy Division

SUBJECT: PROPOSAL TO ABOLISH THE DEPUTY INSPECTOR GENERAL; DEPUTY INSPECTOR GENERAL, SENIOR; AND DEPUTY INSPECTOR GENERAL, IN-CHARGE ELIGIBLE LISTS; AND TO VOID APPOINTMENTS MADE FROM THE DEPUTY INSPECTOR GENERAL, IN-CHARGE ELIGIBLE LIST

REASON FOR HEARING

SPB staff is recommending that three eligible lists created from promotional examinations given by the Office of the Inspector General (OIG) be abolished and that two appointments made from one of those lists be voided. This hearing is to allow the Board to hear from OIG, affected employees and interested members of the public before reaching a final decision on staff's recommendation.

BACKGROUND

In July 2003, OIG was notified that its budget was scheduled to be reduced by approximately 70% and that a large number of OIG employees, the vast majority of whom were in Deputy Inspector General (DIG) classifications, would be subject to lay-off if they did not first obtain employment with other state agencies.

Most of OIG's employees in the DIG classifications had transfer appointments, and not list, appointments, in order to enhance those employees' opportunities for further transfer appointments into different classifications in other state agencies, OIG decided to conduct promotional examinations for the following classifications: DIG; DIG, Senior; and DIG, In Charge. In an e-mail to an Associate DIG (ADIG) dated August 11, 2003, OIG's personnel analyst explained the purpose for the examinations as follows:

1. The purpose of these promotional exams is to afford the opportunity to individuals serving an appointment in a class to gain a "list" appointment to the class. Many individuals within our agency were appointed to the class for which they are an incumbent by virtue of a lateral transfer. To gain a list appointment to the class may very well afford these folks the chance for a wider variety of options to move elsewhere.

2. For those of you who are ADIGs, there is no anticipated benefit to compete. The agency is in no position to offer promotions (ADIG to DIG, for example). The purpose of all of this is to let DIGs get list appointments to DIG, DIG, Senior to gain list appointments to DIG, Senior, etc.

OIG conducted the promotional examinations during August 2003. Fifteen OIG employees took the DIG examination, ten of whom already had permanent status in that classification as a result of transfer appointments. Eleven OIG employees took the DIG, Senior examination, three of whom already had permanent status in that classification as a result of transfer appointments. Three OIG employees took the DIG, In-Charge examination, two of whom already had permanent status in that classification as a result of transfer appointments.

In September 2003, after receiving a complaint about the examinations, SPB staff initiated an investigation and froze the eligible lists; thereby, prohibiting OIG from making any further appointments from the lists until after the investigation was completed. Before SPB staff froze the DIG, In-Charge eligible list, OIG had made two appointments from that list.

On December 5, 2003, SPB staff issued a report, finding, among other things, that OIG had administered the promotional examinations not to find well-qualified candidates to fill vacant positions, but, instead, to provide employees already in the tested classifications with list appointments so that they would be better able to obtain future transfers to different classifications in other state agencies, and thereby circumvent Board Rule § 435, which prohibits consecutive transfers.[1] (A copy of the staff report is attached hereto as Attachment 1.)[2]

---

[1] Title 2, California Code of Regulations § 435 provides:

> Consecutive transfers shall not be permitted when their combined result would be inconsistent with the provisions of this article or Government Code Section 19050.4.

The effect of this rule is to prohibit an employee from obtaining multiple transfer appointments where the total result of those transfer appointments would be to grant the employee an appointment to a classification whose maximum salary range is two or more steps higher than the maximum salary range of the employee's last list appointment. In other words, the rule prohibits consecutive transfers when the net result is to allow an employee to transfer into a promotional position without having taken a promotional examination.

[2] In 2002, when OIG was about to close its Rancho Cucamonga office, OIG administered a DIG examination. In August 2002, OIG granted list appointments to eight DIGs on the eligible list who had transfer appointments. In March 2003, SPB staff was informed of those list appointments by the State Controller's Office. When SPB inquired about those appointments, OIG stated that they "were made in order to enhance/broaden the individuals' potential for lateral transfers. The decision to provide list appointments was made in light of departmental layoffs and is not precluded by applicable law and/or rule." SPB staff took no action to void those appointments.

APPLICABLE LAW

Article VII, Section 1, subdivision (b) of the California Constitution provides:

> In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Government Code § 18900, subdivision (a) provides:

> Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule.

Government Code § 18935, in relevant part, provides:

> The board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:
>
> ...(b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies.

Government Code § 19257.5 provides:

> Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning if such action is taken within one year after the appointment.

ISSUES

The following issues are before the Board for review:

1. Should the Board exercise its authority under Government Code § 18935, subdivision (b) to abolish the eligible lists created from the OIG examinations?

2. Should the Board exercise its authority under Government Code § 19257.5 to void the two list appointments made from DIG, In-Charge eligible list?

SUMMARY OF SPB STAFF'S POSITION

SPB staff recommends that the eligible lists be abolished and the appointments made from one of those lists be voided for the following reasons:

Article VII, Section 1, subdivision (b) of the California Constitution mandates that appointments in the civil service be based upon merit ascertained by competitive examination. Government Code § 18900, subdivision (a) provides that eligible lists shall be established as a result of free competitive examinations. The merit principle and Government Code § 18900 mandate that appointing powers must refrain from making any pre-determinations as to who they will or will not select for appointment or promotion until after a fair and equitable examination process has been conducted.

Government Code § 18935, subdivision (b) authorizes the Board to refuse to certify appointments from an eligible list when it determines that an examination was administered solely for the purpose of providing pre-selected transferees with list appointments in their current positions and not as a valid testing device to select meritorious candidates for promotion to vacant positions.

Because OIG administered the DIG, DIG, Senior and DIG, In-Charge examinations for the sole purpose of granting list appointments to incumbent transferees in order to enhance their ability to transfer further to new classifications in other state agencies without having to take competitive examinations for those new classifications, the examinations violated the merit principle. The Board should exercise its authority under Government Code § 18935, subdivision (b) and abolish the eligible lists. In addition, the Board should exercise its authority under Government Code § 19257.5 and void the appointments made from the DIG, In-Charge list.

By abolishing the lists and voiding the illegal appointments, the Board will not adversely impact any employees' ability to seek further legal transfers from their last list appointments or to take examinations to obtain legal promotional appointments.

SUMMARY OF OIG'S RESPONSE

On December 29, 2003, OIG submitted its Response to staff's investigative report. (A copy of OIG's Response is attached hereto as Attachment 2.)

In its Response, OIG argues that the Board should not exercise its authority under Government Code § 18935, subdivision (b) for the following reasons:

(1) In 2000, after OIG's mandate was significantly expanded by the Legislature, OIG had an urgent need to fill 110 positions. Blending audit and

investigative duties into a single classification created the DIG classification. Given its urgent need to hire a significant number of employees into a newly created classification where few met the minimum qualifications, OIG decided to fill most DIG positions through transfer, rather than list appointment. The incumbent employees on the list have satisfactorily performed their duties in their classifications for several years. In light of these unique circumstances, the Board should refrain from exercising it authority under Government Code § 18935, subdivision (b).

(2) Incumbent employees were not given sufficient notice of SPB's "last list appointment" policy, which prevents them from obtaining consecutive transfers that would result in a salary that is 10% or more greater than the salary of their last list appointment.

(3) Authorizing the list appointments and subsequent transfers of the employees in this case is no more violative of the state's merit principles that other transfer practices routinely permitted by SPB.

OIG requests that SPB certify the eligible lists generated from the disputed examinations. In the alternative, OIG requests that the Board approve the transfers of those employees whose transfers would violate SPB's consecutive transfer rule.

SPB STAFF RECOMMENDATION

SPB staff recommends that the Board adopt the following resolution abolishing the eligible lists and voiding the two appointments made from those lists:

WHEREAS, Article VII, Section 1, subdivision (b) of the California Constitution provides, "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination"; and

WHEREAS, Government Code § 18900, subdivision (a) provides, "Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule"; and

WHEREAS, Government Code § 18935, in relevant part, provides, "The board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories: ...(b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies"; and

WHEREAS, Government Code § 19257.5 states, "When the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning if such action is taken within one year after the appointment"; and

WHEREAS, in or about August 2003, the Office of the Inspector General (OIG) administered promotional examinations for the classifications of Deputy Inspector General, Deputy Inspector General, Senior and Deputy Inspector General, In-Charge and established the following eligible lists:

- Deputy Inspector General effective September 11, 2003
- Deputy Inspector General, Senior effective September 11, 2003
- Deputy Inspector General, In-Charge effective August 21, 2003

WHEREAS, OIG administered the examinations and established the eligible lists for the sole purpose of providing pre-selected transferees with list appointments in their current positions, and not as valid testing devices to select meritorious candidates for promotion to vacant positions; and

WHEREAS, OIG's purpose in conducting the promotional examinations and establishing the eligible lists was contrary to the merit principle embodied in Article VII, Section 1, subdivision (b) of the California Constitution and the provisions of Government Code § 18900 subdivision (a);

WHEREAS, in light of the foregoing, the Board has decided to exercise its authority under Government Code § 18935, subdivision (b) to withhold and withdraw from certification the names of all employees on the eligible lists who, at the time of examination, had permanent status in the classifications for which they applied, and to abolish the eligible lists;

WHEREAS, the Board has also decided to exercise its authority under Government Code § 19257.5 to void all appointments that may have been made from the eligible lists;

THEREFORE, BE IT RESOLVED AND ORDERED, that:

(1) Pursuant to Government Code § 18935, subdivision (b), the Board hereby withholds and withdraws from certification the names of all employees on the eligible lists for Deputy Inspector General, Deputy Inspector General, Senior, and Deputy Inspector General, In-Charge, who, at the time of examination, had permanent status in the classifications for which they applied, and abolishes those lists.

(2) Pursuant to Government Code § 19257.5, the Board hereby voids the list appointments of the two Deputy Inspector General, In-Charge that were made from the Deputy Inspector General, In-Charge eligible list that has been abolished.

(3) The Board's actions in abolishing the eligible lists and voiding the appointments shall not adversely impact the ability of the employees whose names were on the abolished eligible lists to obtain transfer appointments based upon their last list appointments or to take promotional examinations that are administered in accordance with applicable law and rules.

STATE PERSONNEL BOARD (SPB) REVIEW OF THE DEPUTY INSPECTOR GENERAL (DIG); DEPUTY INSPECTOR GENERAL, SENIOR (DIG, SENIOR); AND DEPUTY INSPECTOR GENERAL, IN-CHARGE (DIG, IN-CHARGE) EXAMINATIONS

BACKGROUND

In October 2003, SPB staff received a complaint from an Office of the Inspector General (OIG) employee regarding administration of the DIG examination. The complainant questioned the appropriateness of the DIG examination, referring to an e-mail sent to them by an analyst in the OIG Personnel Office, that indicated that the purpose of these promotional examinations was to provide individuals already holding permanent, full-time appointments in the class, the opportunity to gain a "list" appointment. The e-mail expressed the view that there was no anticipated benefit for others to compete because the department was not in a position to offer appointments to other competitors. A similar e-mail, sent by the personnel analyst to another OIG employee, was subsequently received by SPB staff in the course of the investigation. Again, the e-mail indicated that the purpose of the examination was to only provide an opportunity for "list" appointments for those already holding transfer appointments in the class and expressing the view that no other appointments would be made from the list (see Attachment A).

In response to the complaint, SPB staff initiated an investigation to determine:

1. **Did the department discourage or attempt to discourage, hinder or prevent candidates from competing in the examinations?**

2. **Were the examinations scheduled and administered to address legitimate employment needs of the department?**

3. **Were the examinations job-related and competitive as required by the California Constitution [Article VII, Section 1(b)] and civil service laws and rules Government Code (G.C.) § 18930 and California Code of Regulations (CCR) 198.**

INVESTIGATION

The OIG is undergoing a major budget reduction that has resulted in the need to eliminate positions in the DIG, the DIG, Senior and the DIG, in Charge classifications. As a result of the budget reductions, there are no current vacancies in these classifications, and no vacancies are anticipated during the reasonable life of any eligible list created for these classes. The OIG nevertheless, scheduled and administered examinations for the DIG, the DIG, Senior and the DIG, In-Charge classifications. The final file date for these examinations was August 18, 2003. All of the examination processes had been completed and all three lists had been established at the time that SPB initiated its review. SPB immediately froze the three lists pending the outcome of the investigation. Two appointments had already been made, however, from the DIG, In-Charge eligible list. No other appointments have been made and the lists remain frozen.

The DIG list contains 15 list eligibles, including ten individuals already holding permanent appointments in the class. The DIG, Senior list contains 11 list eligibles, including three individuals already holding permanent appointments in the class. The DIG, In-Charge list had three list eligibles, including two already in the class holding permanent appointments in the class. These two individuals had already received "list" appointments from the DIG, In Charge list at the time SPB received the complaint (see Attachment A).

ISSUE #1

Did the department discourage or attempt to discourage, hinder or prevent candidates from competing in the examinations?

G.C. § 18952 provides that:

> Any employee who feels aggrieved at any action taken by any superior or fellow employee in discouraging or in any manner hindering or preventing him from taking any examination or any other action which he deems beneficial to himself may appeal to the board in writing. Any such appeal or communication in connection therewith is confidential and shall not be disclosed without the consent of the employee taking such appeal. Immediately after receiving such appeal the board shall investigate and shall take such action as it deems necessary."

G.C. § 19680(a) states that it is unlawful for any person:

> Wilfully by himself or in cooperation with another person to defeat, deceive, or obstruct any person with respect to his right of examination, application, or employment under this part of board rule.

G.C. § 19682 provides that:

> Every person who violates any provision of this chapter is guilty of a misdemeanor. Adverse action may be taken by the appointing power, or the executive officer of the board may file charges, against a state employee who violates any provision of this chapter.

The department's personnel analyst, in response to questions regarding the exam, sent e-mails to two employees in the Associate Deputy Inspector General (ADIG) classification (potential candidates for the DIG exam). The e-mails sent to Personnel

by the potential candidates asked several questions, including a question regarding the purpose of the promotional exam.

The personnel analyst's response stated:

1. "The purpose of these promotional exams is to afford an opportunity to individuals serving an appointment in a class to gain a "list" appointment to the class. Many individuals within our agency were appointed to the class for which they are an incumbent by virtue of a lateral transfer. To gain a list appointment to the class may very well afford these folks the chance for a wider variety of options to move elsewhere."

2. "For those of you who are ADIGs, there is no anticipated benefit to compete. The agency is in no position to offer promotions (ADIG to DIG, for example). The purpose of all of this is to let DIGs get list appointments to DIG, DIGs, Senior to gain list appointment to DIG, Senior, etc."

The department's personnel analyst indicates that what he meant by the statement that, "there was no anticipated benefit to compete" was that the agency was not planning on using the lists to promote anyone[1].

All five ADIG incumbents subsequently filed applications for the DIG examination and achieved list eligibility. We note that a number of individuals in the DIG and the DIG, Senior classes did not file for the higher-level classes in the series, i.e., DIG, Senior and DIG, In-Charge examinations. It is not known if these individuals were aware of the department's purpose for administering these exams, i.e., to provide "list" appointments to individuals already in the class, or if they simply chose not to participate, given proposed position cuts in the OIG, which could diminish promotional opportunities. The

[1] The OIG intended only to reappoint certain individuals already appointed and working in these classes. No other successful exam competitors could or would be appointed since the department had no present and anticipated no future vacancies.

department's personnel analyst indicates that he did not send similar e-mails to any other candidates, including potential candidates for the DIG, Senior and/or the DIG, In-Charge examinations.

FINDING #1

While the evidence is insufficient to conclude that the e-mails sent by the Personnel Analyst actually resulted in any candidate deciding not to participate in these examinations, the language in the e-mails and the circumstance surrounding these examinations (scheduled to only appoint selected candidates) had the potential for hindering candidates participation in the examinations. We believe that the message sent to other candidates (non-incumbents) was that their participation in these examinations was an idle act and that irrespective of their qualifications they would not be appointed. This message and examinations of this character are inconsistent with our merit requirement.

ISSUE #2

Were the examinations scheduled and administered to address legitimate employment needs of the department (fill vacancies)?

Article VII, Section 1 (b), Constitution of the State of California requires that permanent appointments and promotions be based on merit as ascertained by competitive examination.

CCR § 425 permits transfers of employees between departments where the transfer is to a position in the same class or another class with substantially the same salary and designated as appropriate by the Executive Officer.

CCR § 435 provides that consecutive transfers shall not be permitted when their combined result would be inconsistent with the provisions of this article or G.C. § 19050.4.

As noted above and acknowledged by the department, these examinations were not administered to fill any present or future vacancies. The sole purpose of the examinations was to provide incumbents with "enhanced" transfer opportunities to obtain positions in other departments. The department indicates that the decision to administer the three promotional examinations was made because of substantial, proposed departmental reductions and layoffs, and the department's interest in enhancing its employees' opportunities to find jobs in other departments. Its particular interest in administering these examinations was to enhance the ability of fifteen individuals to transfer to more lucrative jobs in other agencies.

The fifteen incumbents that the OIG sought to reappoint to their current positions, transferred to their current positions in the OIG under the provisions of CCR § 425. The examinations administered by the OIG were intended to circumvent the believed impact of CCR § 435 on incumbents. The OIG believed that without a reappointment these incumbents would be:

(1) Barred from now transferring to other State agencies because CCR § 435 prevents consecutive transfers

(2) Limited to transferring to lower paying positions

Staff notes that CCR § 435 was intended to ensure that promotions in the State civil service occur by competitive promotional examinations as required by the California Constitution and ensure that the transfer provisions not be used to circumvent this requirement. Incumbents who transferred to positions are not barred from further transfers to other agencies. They may transfer to positions without the need for reappointments intended by these examinations as long as such transfers do not result

in promotions[2]. In reviewing the SPB transfer rules, we note that the criteria for these transactions are primarily based on salary distinctions between classes rather than a clear definition of the constitution's promotional requirement. We propose to revise those rules to prevent further misunderstandings of the constitutional requirement. In the interim the statutes permit the Board to designate appropriate classes for transfer purposes. The OIG may request such designations from the Board on a case-by-case basis for incumbents.

FINDING #2

These examinations were not intended to fill positions but to circumvent/avoid the impact of CCR § 435. Consecutive Transfer, and to provide what the department believed were "enhanced" employment opportunities for their staff. Staff believes that use of the selection process was inappropriate and unnecessary for these purposes. The SPB transfer rules should be revised to clarify the constitutional requirement of promotions by examinations and clarify when transfers between classes are appropriate.

ISSUE #3

Were the examinations job-related and competitive as required by the California Constitution [Article VII, Section 1(b)] and civil service laws and rules

[2] Staff notes that in at least one instance an incumbent anticipated transferring from a working level position to a supervisory position based on a reappointment to their current positions. We believe that such a transfer would be inconsistent with the Constitution and such promotion must be accomplished by competing in an examination for the supervisor class.

(G.C. § 18930 and CCR § 198)?

Article VII, Section 1 (b), Constitution of the State of California states:

> In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination. (emphasis added).

G.C. § 18930 provides that:

> Examinations for the establishment of eligible lists shall be competitive and of such character as fairly to test and determine the qualifications, fitness, and ability of competitors actually to perform the duties of the class of positions for which they seek appointment..."(emphasis added).

CCR § 198 states:

> Ratings of education, experience, and personal qualifications shall be made on a competitive basis in that each competitor shall be rated thereon in relation to the minimum qualifications for the class in question and in relation to the comparable qualifications of other competitors..."(emphasis added).

Staff's review of these examinations included an assessment of the extent to which OIG personnel examination practices conform to State laws, regulations, and merit principles. This included review of exam planning activities, i.e., including the reason(s) for administering these examinations; review of the Qualifications Appraisal Panel (QAP) interview questions, rating criteria, Education and Experience rating criteria, and scoring methods; as well as certification requests, job analysis documentation, appointments, and eligible list composition. An on-site meeting was conducted to advise the department of the complaint and to obtain additional information relative to the examinations.

Deputy Inspector General (DIG)

The examination for the DIG consisted of a Qualifications Appraisal Panel (QAP) interview, weighted 100%, including three patterned questions. Fifteen candidates were interviewed and all passed. While nine scores were available to the raters, they utilized only three scores (ranks): 94, 88, and 82. The effect of the use of three scores was that all candidates were reachable. Of the 15 list eligibles, ten already hold permanent appointments in the DIG class (through lateral transfer), and five are promotional candidates. The OIG ordered an official certification list for the purpose of making 10 list appointments purportedly for the 10 individuals already in the class. This certification request was subsequently cancelled by SPB pending completion of the investigation.

Deputy Inspector General, Senior (DIG, Senior)

The examination for the DIG, Senior consisted of a QAP interview, weighted 100%, including the same three questions as asked at the lower level (DIG), plus one additional question intended to assess supervisory skills. Again, only three scores (ranks) were assigned in this examination. Eleven candidates were interviewed and all passed. Of the 11 list eligibles, three already hold permanent appointments in the DIG, Senior class (through lateral transfer appointments), and eight are promotional candidates. The OIG ordered an official certification list for the purpose of making three list appointments (again, purportedly for the three individuals already in the class). This certification request, however, was also cancelled by SPB pending completion of the investigation.

Deputy Inspector General, In-Charge (DIG, In-Charge)

The DIG, In-Charge examination was administered as an Education and Experience (E & E) examination. Three candidates participated and were placed on the list. Three

scores were assigned: 95, 90 and 85. A score of 95 was assigned if the candidate was already in the class of DIG, In-Charge. A score of 90 was assigned if the candidate was in the DIG, Senior class. A score of 85 was assigned for all other candidates who met the minimum qualifications for entry into the exam. Two of the candidates placed on the list already held permanent appointments in the DIG, In-Charge class (through lateral transfer) and one is a promotional candidate. The OIG ordered an official certification list for two appointments, resulting in "list" appointments, effective August 21, 2003, for the appointment of the two candidates already in the class. The department indicated that they did not intend to appoint the third list eligible.

The department indicates that they did not conduct a job analysis for the examinations. They indicate that the DIG and DIG, Senior exams were developed by examination consultants, using the DIG series job specification to identify the knowledges and abilities to be tested. They indicate that the QAP questions were based on actual duties performed by DIG and DIG, Senior staff and the knowledges and abilities contained in the job specification. The department states that they used the same three QAP questions for both the DIG and DIG, Senior exams for efficiency purposes in scheduling the interviews, and that the use of the same questions in series exams is not unusual. The department states that the rating criteria guided the panel to the use of only three scores: Superior, Well-Qualified, and Satisfactory. They also indicate that (1) the size of the candidate group did not warrant using the full range of nine scores, (2) that the use of three scores in exams of this size was not unusual, (3) in a small exam, it is more difficult to make fine distinctions between candidates, and (4) it is not fair to the candidates to use all 9 scores.

FINDING #3:

Staff notes there were deficiencies in all of the examinations, particularly in the areas of scoring and rating criteria. In the DIG and the DIG, Senior examinations, the small number and type of questions asked makes it difficult to determine if the selection processes provided for an effective comparative assessment of the candidates'

qualifications or the relative strength of their knowledges, skills, and abilities. Additionally, efficiency in scheduling candidate interviews should not be the basis for determining the questions to be asked; rather these should be developed consistent with the job duties of each classification and the requisite knowledges, skills and abilities required to perform at each level. Similarly, each of the interview questions had only three anchored rating scales, i.e., Superior, Well-Qualified and Satisfactory. There was no rating scale that defined Fair and Passable benchmark responses and nothing that distinguished performance within the three categories. Benchmarks provide the interview panel with a qualitative and/or quantitative means of rating candidates' responses and assist the panel in making fair, objective, reliable ratings that differentiate between candidates. Each rating benchmark covered three scores and there were no instructions provided to the raters for assigning a score that corresponded with the benchmark range. While a wider distribution of nine scores was available for use by the raters, there were no rating criteria to anchor the scores and the rating criteria were not clearly and concisely written. There are no laws or rules that authorize the use of limited scores for small candidate groups.

With respect to the DIG, In-Charge examination, an E&E process is often utilized for small candidate groups. Nevertheless, we have significant concerns regarding the rating criteria, which was based upon status within specific classifications. While there may be some support for assigning scores on this basis, i.e., presuming that such status automatically ensures performance of specific tasks and satisfactory demonstration of specific knowledges, skills and abilities required for the class, there is no documentation in the exam file to support this presumption. Additionally, it is generally recognized that status or experience in a particular class, alone, is not sufficient to allow measurement of quality, variety, or breadth of experience. On that basis, there is no evidence that this examination included a comparative assessment of the candidates' relative knowledges, skills, or abilities.

In summary, staff is concerned regarding the quality of the DIG examinations. Nevertheless, there is not sufficient evidence to demonstrate that they are not job-

related or competitive, and that they did not fairly test the candidates' qualifications and fitness for the job. On that basis, staff concludes that there is not a violation of the California Constitution (Article VII, Section 1(b) and/or civil service laws and rules (G.C. §18930 and CCR § 198).

RECOMMENDATION

(1) Staff recommends that the DIG, the DIG, Senior and the DIG, In-Charge examinations be abolished and that the OIG be permitted to request transfer determinations from SPB for incumbents on a case-by-case basis.

(2) The SPB regulations governing transfers between classes be revised to clarify the constitutional requirement for promotion and clarify when transfers between classes are appropriate.

ATTACHMENT A

> -----Original Message-----
> From:
> Sent: Monday, August 11, 2003 11:21 AM
> To:
> Subject: DIG Exam
>
> Since all of the ADIG's are being surplused, I would
> like to know the purpose of a promotional exam. Is there a benefit to us
> being on a DIG list even though agencies are restricted to the
> SROA/surplus list?
>
> Also, I would like to know if this exam can be used
> for list appointments. The reason for my question is that I just finished
> reading the instructions for completing a state application and it states
> that "only civil service employees who meet the deinition of a promotional
> candidate may file for promotional examinations. All other must file for
> open examinations." Are employees who laterally transferred considered
> "promotional candidates?"

> -----Original Message-----
> From:
> Sent: Monday, August 11, 2003 2:20 PM
> To:
> Subject: RE: DIG Exam
>
> In answer to your questions (if I don't answer all
> of your concerns, let me know):
>
> 1. The purpose of these promotional exams is to
> afford the opportunity to individuals serving an appointment in a class to
> gain a "list" appointment to the class. Many individuals within our
> agency were appointed to the class for which they are an incumbent by
> virtue of a lateral transfer. To gain a list appointment to the class may
> very well afford these folks the chance for a wider variety of options to
> move elsewhere.
>
> 2. For those of you who are ADIGs, there is no
> anticipated benefit to compete. The agency is in no position to offer
> promotions (ADIG to DIG, for example). The purpose of all of this is to
> let DIGs get list appointments to DIG, DIG, Senior to gain list
> appointments to DIG, Senior, etc.
>
> 3. The language you are quoting relates to taking

> examinations. To compete in a promotional examination, an individual must
> possess a permanent appointment within State service. That makes them a
> promotional candidate for examination purposes. To laterally transfer to
> another State classification, you must also have a permanent appointment,
> but you don't have to meet the "Minimum Qualifications" of the class to
> which you transfer. You must meet certain salary criteria (roughly, the
> salary range of the "from" class must be within 10% of the salary range of
> the "to" class).
>
> People who ultimately laterally transfer to a class
> within State service must have, at one time, have gained a permanent
> appointment within State service from an eligible list.
>
> I don't know if any of this will make sense . . . if
> you wish to discuss this further, please let me know.

> -----Original Message-----
> From:
> Sent: Wednesday, August 13, 2003 6:28 AM
> To:
> Subject: RE: DIG Exam
>
> Just one more question.
>
> An employee who transfers laterally can get a list
> appointment on an in-house promotional exam?

> -----Original Message-----
> From:
> Sent: Wednesday, August 13, 2003 7:04 AM
> To:
> Subject: RE: DIG Exam
>
> Not always . . . according to Government Code section 18935 (b), a
> testing agency MAY refuse to examine someone who "At the time of the
> examination has permanent status in a position of equal or higher class
> than the examination or position for which he or she applies."
>
> My emphasis is on the word "MAY" because OIG decided to not invoke
> this code section and allow individuals to compete for the class in which
> they already held an appointment. The State Personnel Board has attempted
> to force departments to stop allowing people at the same level compete for
> exams, but the current language in the government code does not forbid the
> practice, it only makes it optional.

>
> Therefore, at another agency, a person may be prevented from doing
> what we here at OIG are doing to benefit staff.

> -----Original Message-----
> From:
> Sent: Monday, August 18, 2003 3:19 PM
> To:
> Subject: RE: DIG Exam
>
> According to SPB (Associate Personnel Analyst), the code
> section you quoted does not apply to staff with a permanent position in
> our agency. Would you please clarify this.

> -----Original Message-----
> From:
> Sent: Tuesday, August 19, 2003 6:36 AM
> To:
> Subject: RE: DIG Exam
>
> I'm not sure what I am clarifying . . . I am saying that the code section
> is discretionary, and we are NOT applying it to staff.
>
>
>
>

Subject: FW: DIG/Sr. DIG exam

FYI

70

---Original Message---
From:
Sent: Tuesday, August 05, 2003 9:51 AM
To:
Subject: RE: DIG/Sr. DIG exam

I have just received word from concerning a DIG promotional exam with a final filing date of 8-18-03. Fliers will be released tomorrow, or Thursday at the latest.

In your case, you have eligibility on the DIG list until 8-23-03, so it will be necessary to re-apply to continue that eligibility.

Please be informed that the intent of these examinations is to provide individuals with list appointments to the class to which they were appointed on a lateral transfer basis. This will enhance their ability to gain employment elsewhere. There is no intent, as I understand it, to promote anyone from the lists to be compiled.

---Original Message---
From:
Sent: Monday, August 04, 2003 1:59 PM
To:
Cc: = DIGs - Associate
Subject: DIG/Sr. DIG exam

Hi ,
Some of the staff down here in Visalia have said there will be a DIG and Sr. DIG exam offered with a final filing date of 8/18/03. First of all, can you confirm whether that information is accurate (I have not seen a flier). If so, do those of us who are already on the promotional list, need to retake the test in order to stay active on the list?

OFFICE OF THE INSPECTOR GENERAL

DATE: December 29, 2003

TO: STATE PERSONNEL BOARD
Policy Division
Attn: Daphne Baldwin

FROM: BRUCE A. MONFROSS
Senior Staff Counsel

SUBJECT: Response of the Office of the Inspector General to the State Personnel Board's Review of the Inspector General's Examinations - Deputy Inspector General, Deputy Inspector General, Senior, and Deputy Inspector General, In-Charge

I.
INTRODUCTION

Appellant Office of the Inspector General (hereinafter "OIG") submits this Response of the OIG to the "State Personnel Board's (hereinafter "SPB") Review of the OIG's Examinations - Deputy Inspector General (hereinafter "DIG"), DIG-Senior, and DIG-In Charge." This response was drafted in response to an invitation from the SPB to the OIG to submit written comments to the SPB concerning the proposed decision of the SPB Appeals Division that would, if officially implemented, invalidate the three examinations in question.

The OIG contends that the proposed decision of the SPB, as set forth in the December 5, 2003, memorandum addressed to the OIG, is incorrect and, for those reasons set forth below, should not be implemented as a formal decision of the SPB.

II.
BACKGROUND

The OIG was created by the Legislature in 1994 for the limited purpose of reviewing the policies and procedures followed by entities within the Youth and Adult Correctional Agency (YACA) in conducting investigations and audits. At that time, the OIG was a small entity housed within YACA with responsibility for conducting reviews at the request of either the agency Secretary or a member of the Legislature. During 1998 and 1999, however, the Legislature fundamentally changed the structure and mandate of the OIG, transforming the OIG into an independent agency reporting directly to the Governor and greatly expanded the Inspector General's responsibility for overseeing California's correctional agencies.

As a result of this change in mandate, beginning in 2000, the OIG began to greatly expand the hiring of employees. At that time, the OIG employed approximately 18 staff members. As a result of its newly-enacted statutory mandate and accompanying increased funding, however, the OIG was required to quickly fill approximately 110 positions to address an immediate back-log of approximately 200 complaints, with more complaints arriving daily. The Deputy Inspector General (DIG) classification, which blends audit and investigatory duties into a single classification, was created for use by the OIG during this time period. The OIG is the only state agency that employs individuals in the DIG classification.

Given the unique characteristics of the DIG classification, it would not have been practical to have conducted an examination for the class, as it is doubtful that more than a handful of candidates would have met the minimum qualifications for the classification. That is due to the fact that most applicable personnel possess either the qualifications of an investigator or the qualifications of an auditor, and it is rare that an individual would possess the qualifications of both an investigator and an

auditor. Consequently, the vast majority of OIG employees appointed to the DIG classification were appointed by means of transfer eligibility, as opposed to list eligibility.[1]

In July 2003, the OIG was notified that its budget was scheduled to be reduced by approximately seventy percent, and that a large number of OIG employees, the vast majority of whom were employed in the DIG classification, would be subject to lay-off if they did not obtain employment at another state agency. Given this drastic announcement, the OIG began to look at all available means to enhance its employees' ability to obtain comparable alternate employment.

As a result, during August 2003, the OIG conducted Departmental promotional examinations for the following classifications: DIG; DIG-Senior; and DIG-In Charge.[2] One of the purposes for conducting the examinations was to make OIG employees who were subject to lay-off competitive for comparable appointments at other state agencies. All OIG employees who expressed a desire to participate in the examination process were permitted to do so, and no employee who took the examination scored lower than the third rank, thus making them eligible for appointment/promotion from the list. Most, if not all, of the OIG employees who participated in the examinations had been appointed to their respective DIG classification during 2000 or 2001, and had satisfactorily performed the duties of their classification for several years prior to the announced August 2003 examinations.

The examinations were deemed necessary because OIG Personnel Office staff were aware that the SPB had previously taken the position that consecutive transfers into different classifications that result in a de facto promotion for the employee would be voided. According to SPB representatives, such an impermissible de facto promotion occurs if the consecutive transfer results in the employee being appointed to a classification, the highest salary range of which is 10 percent (two-steps) or more

[1] Staff from the Department of Personnel Administration (hereinafter "DPA") worked very closely with OIG staff in creating the DIG classifications, and specifically approved the transfer of employees from their respective investigative or auditor classifications into the new classification.

[2] The DIG-Senior and DIG-In Charge classifications had previously been created for senior and supervisory positions.

greater than the highest salary range of the employee's **last list appointment** (hereinafter referred to as the "last list appointment policy").

Because the OIG is the only state agency that employs DIGs, it is the only agency with any conceivable reason for conducting a DIG examination. Being aware of the SPB's "last list appointment policy," and because the OIG wanted to afford its employees the actual benefit of the experience they gained during their employment with the OIG so that they would be better able to compete for comparable appointments into otherwise transfer-eligible classifications, the OIG determined that the only way to give its employees the benefit of their experience with the OIG was to conduct the disputed examinations.[3]

During September 2003, representatives of the SPB contacted the OIG Personnel Office, requesting that the OIG provide the SPB with those documents related to the above-described examinations. Shortly after this request was made, and before all applicable inquiries and disclosures had been made, the SPB rescinded the OIG's examination authority and "froze" the three examinations, thereby rendering them invalid during the relevant time period while the SPB's inquiry into the matter continued.

On December 8, 2003, the OIG received a memorandum from the SPB, dated December 5, 2003, in which the SPB stated its intent to invalidate all three of the examinations in question. The SPB further stated its intention to void any appointment of a DIG to a new classification that did not comport with the "last list appointment policy." As justification for the proposed decision, the memorandum indicated:

> Staff notes that CCR § 435 was intended to ensure that promotions in the State civil service occur by competitive promotional examinations as required by the California Constitution and ensure that the transfer

[3] It should also be noted that the examinees had successfully performed their OIG duties for a number of years, and were highly sought after by other state agencies once they were designated as surplus employees and were placed on the SROA list.

> provisions not be used to circumvent this requirement. Incumbents who transferred to positions are not barred from further transfers to other agencies. They may transfer to positions without the need for reappointments intended by these examinations as long as such transfers do not result in promotions. [Footnote omitted.] In reviewing the SPB transfer rules, we note that the criteria for these transactions are based primarily on salary distinctions between classes rather than a clear definition of the constitution's promotional requirement. We propose to revise those rules to prevent further misunderstandings of the constitutional requirement. (Emphasis in original.)[4]

The SPB's proposed decision has, not unexpectedly, greatly affected the ability of OIG employees who had successfully completed the examination to seek alternate comparable employment with other agencies, as those employees were deemed to have only transfer eligibility as a DIG, as opposed to list eligibility as a DIG. In its December 5, 2003, memorandum, the SPB afforded the OIG an opportunity to provide a written response to the SPB's proposed decision.

For those reasons set forth below, the OIG contends that, due to the unique nature of the creation of the DIG classification and the statutory duties of the OIG, it would be remiss of the SPB not to exercise its discretionary authority and declare as "eligible" those individuals who participated in the disputed examinations, irrespective of the fact that at the time of the examination those individuals held "permanent status in a position of equal or higher class than the examination or position for which he or she applie[d]."[5] Such a decision is further justified due to the fact that there exists no legal authority providing state civil service employees constructive notice of the subsequent appointment restrictions placed on transfer-eligible employees by the SPB's unannounced "last list appointment policy." Finally, the OIG contends that authorizing the transfers of the individuals in question here is no more violative of state merit principles than current transfer practices routinely permitted by the SPB.

---

[4] See Memorandum, December 5, 2003, *State Personnel Board's Review of the Office of the Inspector General's Examinations - Deputy Inspector General, Deputy Inspector General, Senior, and Deputy Inspector General, In-Charge*, pp. 6-7.

[5] See Gov't Code § 18935(b).

As a result, the OIG respectfully requests that the SPB certify the disputed examinations. In the alternative, the OIG respectfully requests that the SPB approve the transfer of those few individuals whose transfers fall afoul of the "last list appointment policy."

III.
DISCUSSION

A. Given the Unique Nature of the DIG Classification, the SPB Possesses the Requisite Discretion to Certify the Examinations in Question.

The SPB has a great deal of discretion in certifying individuals as eligible to compete in a particular examination. More specifically, Government Code section 18935 provides, in pertinent part:

> The board may refuse to examine or, after examination, may refuse to declare as an eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:
> (b) At the time of the examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies. (Emphasis added.)

In the present case, the OIG is simply requesting that the SPB utilize its acknowledged discretionary power to certify as eligible those individuals who successfully participated in the disputed examinations. This request is made as a result of the unique set of facts present here.

As discussed in greater detail above, the DIG is a hybrid classification, synthesizing both investigator and auditor functions. As SPB staff have informally conceded, given the unique nature of the classification, it is very doubtful that conducting a DIG examination, thereby permitting the OIG to make list appointments to the DIG classification, would have proved fruitful, as very few individuals would have been able to meet the minimum qualifications for the classification. This is because most individuals perform the duties of either an investigator or an auditor. Very few people possess the requisite qualifications to initially perform the duties of both classifications. Consequently, the OIG made appointments to the DIG classification via transfer-eligibility, as opposed to list-eligibility. These

transfer-based appointments were accomplished after extensive consultation with DPA staff, and were made in conjunction with the OIG's urgent need to rapidly fill approximately 110 positions in a very short period of time.

This is quite unlike the situation surrounding the vast majority of classifications approved by the SPB, as most classifications do not synthesize the unique characteristics and qualities inherent to two or more separate classifications. Nor is there generally such an urgent need to fill as many classification vacancies as the OIG was required to fill in a very short period of time. As a result, in nearly all other cases, there exists no practical reason for the appointing authority not to conduct an examination when it is seeking to fill vacancies to a particular classification. For those reasons set forth above, however, good cause did exist in this case for the OIG not to conduct such an examination.

Similarly, good cause now exists for the SPB to certify the disputed examinations, as the OIG is merely attempting to now do that which it was essentially precluded from doing when first appointing individuals to the DIG classification - giving those individuals the benefit of a list appointment, as opposed to a transfer-based appointment. Indeed, the very language of Section 18935 (i.e., "The board may refuse to examine or, after examination, may refuse to declare as an eligible or may withhold or withdraw from certification ...") indicates that unique situations may arise that justify a decision by the SPB to certify as eligible those examination candidates whom the SPB might, under ordinary circumstances, deem to be ineligible.[6] The OIG maintains that the circumstances of this case are sufficiently unique to justify such a decision by the SPB.

Nor would such a decision open the proverbial flood-gates and thereafter require the SPB to engage in the whole-sale certification of examinations taken by individuals who possess "permanent status in a position of equal or higher class than the examination or position for which he or she applies."

[6] Had the Legislature intended a contrary intent, the statutory language would not contain the permissive "may" language, and instead would contain mandatory terminology, such as, "The board shall refuse to examine or, after examination, shall refuse to declare as an eligible or shall withhold or withdraw from certification ..."

Instead, such a decision would be of limited effect, and would merely authorize such certification in this case, due to the very unique nature of the DIG classification and the OIG's urgent need to rapidly fill those positions so that it could fulfill its statutorily required duties.

In addition, certifying as "eligible" those individuals who participated in the disputed examinations is further justified because SPB statutes and regulations do not provide transfer-eligible employees with the requisite notice of the limitations and restrictions inherent in the SPB's informal "last list appointment policy."

B. SPB Statutes and Regulations Do Not Provide Constructive Notice to Transfer-Eligible Employees of the Restrictions Imposed by the "Last List Appointment Policy."

The SPB has not provided transfer-eligible candidates with constructive notice that moving into a position via transfer-eligibility, as opposed to list-eligibility, may later restrict the candidate's movement into a classification with a salary range that is two-steps higher than the salary range of his/her last list appointment. Instead, applicable constitutional articles, transfer statutes and regulations are either silent or are extremely vague concerning the subject.

It is undisputed that all appointments and promotions within the state civil service must comply with the requirements of the California Constitution. Applicable Constitutional provisions provide that, "In the civil service, permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."[7] While the plain language of the constitution asserts that both permanent appointments and promotions shall be made on the basis of competitive examination, certain statutory and/or regulatory provisions allow current state civil service employees to transfer into a different classification even if they are not on an examination list.

[7] Cal. Const., art. VII, § 1(b).

Title 2, California Code of Regulations, section 435 ("*Consecutive Transfers*"), provides that: "Consecutive transfers shall not be permitted where their combined result would be inconsistent with the provisions of this article or Government Code Section 19050.4."

Government Code section 19050.4, in turn, provides that:

> A transfer, as defined in Section 18525.3, may be accomplished without examination. The board may require an employee to demonstrate in an examination that he or she possesses any additional or different requirements that are included in the minimum qualifications of the class to which the employee is transferring. (Emphasis added.)

Government Code section 18525.3, thereafter provides that:

> "Transfer" means both of the following:
> (a) The appointment of an employee to another position in the same class but under another appointing power.
>
> (b) The appointment of an employee to a position in a different class that has substantially the same level of duties, responsibility, and salary, as determined by board rule, under the same or another appointing authority. (Emphasis added).

Additional SPB regulations further provide:

> *Transfers-General*
> Classes meeting the criteria established by this article shall be considered to involve substantially the same level of duties, responsibility and salary for the purposes of Government Code Section 19050.4; provided that the board or the executive officer may prohibit transfer between such classes based on a specific finding that they are in a promotional relationship. The board or executive officer may also prohibit transfers from classes that have been specifically established for limited duration positions.[8]
>
> *Transfer to Another Agency*
> A transfer of an employee from a position under one appointing power to a position under another appointing power may be made, if the transfer is to a position in the same class or in another class with substantially the same salary range and designated as appropriate by the executive officer. The effective date of such transfer shall be no later than 30 calendar days

[8] Title 2, Cal. Code Regs., § 430 (emphasis added).

> after receipt of a written request from the agency requesting the employee's service to the appointing power by whom the employee is employed, unless an earlier or later date of transfer is agreeable to both appointing powers. No other type of transaction which has the same general effect as a transfer, such as reinstatement following resignation, shall be used to circumvent the above provisions.[9]

The SPB thereafter defines the phrases " substantially the same salary range" and "promotional salary relationship, range or level" as:

> *Salary and Class Level Comparisons*
> (a) The following definitions shall apply to salary and class level comparisons made under this chapter:
> (1) "Substantially the same salary range or salary level" means the maximum rate of the salary range of one class is less than two steps higher than or is the same as the maximum rate of the salary range of another class.
> (2) "Promotional salary relationship, range or level" means the maximum rate of the salary range of one class is at least two steps higher than the maximum rate of the salary range of another class.[10]

While Section 431 references the two steps salary range of "another class," nowhere does it refer to the maximum rate of the salary range of the transfer-eligible employee's last list appointment classification. It would not be unreasonable, therefore, for the transfer-eligible employee to conclude that the "maximum rate of the salary range of another class" referenced in Section 431 refers to the maximum salary rate of the classification the transfer-eligible employee is occupying at the time of his/her transfer into the new classification, not the maximum salary range of his/her last list appointment classification.

That is particularly so in that the entire notice problem could easily be prevented if Section 431(a)(2) simply read: "'Promotional salary relationship, range or level' means the maximum rate of the salary range of one class is at least two steps higher than the maximum rate of the salary range of the

[9] Title 2, Cal. Code Regs., § 425 (emphasis added).

[10] Title 2, Cal. Code Regs., § 431 (emphasis added).

transferring employee's last list appointment class." Such a definition would then put the transfer-eligible employee on notice of the "last list appointment" restriction on consecutive transfers into different classifications. At present, however, such a simple, clearly delineated definition is lacking.

In short, there is absolutely no notice provided to the transfer-eligible employee that the "maximum rate of the salary range of another class" is actually referencing the employee's last list appointment classification. Absent such notice, it is fundamentally unfair to hold that the transfer-eligible employee either knew or should have known that his/her transfer into another classification could be negatively impacted by application of the un-announced "last list appointment policy." Fundamental fairness dictates, therefore, that employees who were appointed to a classification via list eligibility not be held accountable to the SPB's informal "last list appointment policy," absent a showing that each employee had been provided with actual notice of the restrictions and limitations inherent in the informal "last list appointment policy."

Moreover, authorizing the transfer of the few individuals in question here is actually less offensive to state merit principles than current transfer practices routinely authorized by the SPB.

C. Authorizing the Transfer of the Individual's in Question Here Would No More Offend State Civil Service Merit Principles Than Do Current Transfer Practices.

The California courts have allowed appointments in the state civil service to occur by means of transfer eligibility, without the employee having to have taken an examination for the new classification, in those cases where the examination taken by the employee for purposes of appointment to his/her initial classification was closely enough related to the duties, responsibilities and salary of the employee's new classification, such that taking a new examination would be redundant.[11]

Current transfer practices that exist in the state civil service do not, however, comport to the requirements enunciated by the courts. Instead, the current practice allows multiple transfers, with the

[11] See Prof. Engineers in Cal. Gov't v. State Personnel Board (2001) 90 Cal.App.4th 678, 703, *citing* Noce v. Dept. of Finance (1941) 45 Cal.App.2d 5, 10.

only real criteria being that the maximum salary range of the new classification be less than two-steps of the maximum salary range of the employee's last list appointment classification, irrespective of the relationship between the duties and responsibilities of the new classification and the employee's last list appointment classification. SPB staff essentially concede as much by noting that, "In reviewing the SPB transfer rules, we note that the criteria for these transactions are primarily based on salary distinctions between classes rather than a clear definition of the constitution's promotional requirement."[12]

As a result, the following scenario is not at all unheard of in the state civil service: An individual is appointed to classification No. 1 by means of list appointment eligibility. The employee is then permitted to transfer into classification No. 2 because the maximum salary range of the new classification is less than two-steps of the maximum salary range of classification No. 1. The transfer is authorized even though the duties and responsibilities of classification No. 2 are not necessarily closely related to the duties and responsibilities of classification No.1. The employee is then permitted to transfer into classification No. 3, because the maximum salary range of the new classification is also less than two-steps of the maximum salary range of classification No.1. The transfer is authorized despite the fact that the duties and responsibilities of classification No. 3 are even more attenuated from the duties and responsibilities of classification No. 1. This process is followed until the employee is authorized to transfer into classification No. 5, the duties and responsibilities of which are not even remotely related to the duties and responsibilities of classification No. 1.

Current state civil service transfer practices do not, therefore, comport to the requirements set forth by the courts, and do little to protect state merit principles that mandate that only qualified individuals be appointed to a classification. Indeed, the fact that transfer-eligible candidates are not

---

[12] See Memorandum, December 5, 2003, *State Personnel Board's Review of the Office of the Inspector General's Examinations - Deputy Inspector General, Deputy Inspector General, Senior, and Deputy Inspector General, In-Charge*, p. 5. See also, Title 2, Cal. Code Regs., § 425: "A transfer of an employee from a position under one appointing power to a position under another appointing power may be made, if the transfer is to a position in the same class or in another class with substantially the same salary range and designated as appropriate by the executive officer."

required to meet the minimum qualifications for the new classification, coupled with the current practice of not actually tying transfers into one classification from another based on the similarity of duties and responsibilities between the two classifications, is far more violative of state merit principles than the situation presented in the instant case. At least in the present case the duties and responsibilities of those DIGs that transferred into other classifications were actually similar to the duties and responsibilities of their new classifications, and the transferees in question had successfully performed those duties and responsibilities for a number of years.

Given the foregoing, it is readily apparent that the SPB has routinely countenanced the transfer of employees into classifications, the duties and responsibilities of which are not necessarily remotely related to the duties and responsibilities of their last list appointment classification. These transfers are permitted simply because the maximum salary ranges of the classifications are substantially similar.

If it can reasonably be said that such a practice does not violate state merit principles, then it must also logically follow that a transfer, wherein the duties and responsibilities of the employee's current classification are substantially similar to the duties and responsibilities of the new classification, does not violate state merit principles, irrespective of the fact that the maximum salary range of the new classification is not substantially similar to the maximum salary range of the employee's last list appointment. In fact, a contrary determination would implicitly indicate that, in the SPB's opinion, the salary an individual previously received in a former classification is the most important indicator of the individual's qualifications for a new classification, as opposed to the duties and responsibilities the individual is performing in his or her present classification. The OIG submits that such a determination is simply illogical.

Fortunately, in the present case most of the DIGs who participated in the disputed examinations and who subsequently transferred to different classifications at other state agencies are not immediately effected by the SPB's proposed decision because the highest salary of their new classification conforms

to the "last list appointment policy." Several OIG employees, however, are not so fortunate and either had conditional job offers withdrawn once the lists were frozen or were required to choose between taking a demotion into a new classification or be laid off from the OIG. This has resulted in a significant hardship for those employees. In addition, a number of employees have not even been considered for appointment to a different classification after the lists were frozen, due to other state agencies being fearful of having the appointment voided by the SPB due to the "last list appointment policy."

It is, therefore, indisputable that the SPB's "last list appointment policy" places transfer-eligible candidates at a distinct competitive disadvantage vis-à-vis list-eligible candidates, even though it is well established that, given current SPB-approved transfer practices, they should be treated as co-equals for merit purposes. No good reason exists for such an arbitrary, salary-based, distinction.

This unwarranted hardship is even further pronounced in the instant case, as no state agency, save for the OIG, has any incentive to conduct examinations for the DIG classification. Consequently, if the examinations in question are voided because the examinees held "permanent status in a position of equal or higher class than the examination or position for which he or she applie[d]," their ability to find comparable alternate employment will be dramatically limited. This hardship will occur through no fault of the employee, and without even constructive notice from the SPB, of the negative ramifications that might follow if an employee accepts a transfer-based appointment, as opposed to a list-based appointment.

In short, the rather arbitrary, informal policy at issue here results in the worst of both worlds - it does little to nothing to protect merit principles, while simultaneously punishing otherwise well qualified candidates for appointment

IV.
CONCLUSION

Good cause exists for the SPB to utilize its discretionary authority under Government Code section 18935 and declare as eligible those candidates who participated in the disputed examinations. A rational, good-faith reason existed for the OIG not to initially conduct examinations when it was first appointing individuals to the DIG classification, as it was doubtful that most potential candidates would meet the minimum qualifications for such a hybrid classification, and as the OIG had an urgent, pressing need to fill a large number of vacancies in a very short period of time. Similarly, a rational, good faith reason existed for the OIG to conduct the disputed examinations, as it was simply attempting to create at the back end of the DIG appointment process that which it was essentially precluded from doing at the front end of the process - giving it's employees list-based appointments, as opposed to transfer-based appointments.

Certifying the examinees as eligible is further justified based on the fact that the SPB has failed to provide those individuals with constructive notice of the negative consequences that might flow from those individual's accepting transfer-based appointments, as opposed to a list-based appointment. A reasonable review of applicable laws would not put those individuals on notice as to the existence of the SPB's "last list appointment policy" and its inherent restrictions, and it is fundamentally unfair to impose those restrictions on employees without first providing them with at least constructive notice of those restrictions.

Finally, a rational review of current SPB-approved transfer processes reveals that they are fundamentally flawed, and rely almost exclusively on salary distinctions, as opposed to the individual's actual qualifications and experience, when determining whether a particular transfer violates state merit principles. Those approved practices do far more to flout state merit principles than the present case,

where there can be little to no dispute that the individual's in question are qualified to perform the duties of the classifications into which they transferred.

As a result of the foregoing, the OIG requests that the SPB certify all of the disputed examinations in question, as they were conducted for a proper purpose and as good cause exists for deeming each examinee to have been eligible to take the examination. In the alternative, the OIG requests that the SPB approve all of the disputed transfers of OIG employees into different classifications, as good cause exists for such approval.

DATED: 12/29/03

Respectfully submitted,

BRUCE A. MONFROSS, Senior Staff Counsel
for the Office of the Inspector General